

.No. 94-1474-CFX

Title: Idaho, et al., Petitioners
v.
Coeur d'Alene Tribe of Idaho, etc., et al.

Docketed:
March 6, 1995

Court: United States Court of Appeals for
the Ninth Circuit

Entry Date

Proceedings and Orders

Mar 6 1995	Petition for writ of certiorari filed.
Apr 3 1995	Brief amici curiae of California, et al. filed.
Apr 5 1995	DISTRIBUTED. April 21, 1995
Apr 5 1995	Brief of respondents Coeur d'Alene Tribe, et al. in opposition filed.
May 2 1995	Reply brief of petitioners filed.
May 10 1995	REDISTRIBUTED. May 26, 1995
Apr 8 1996	REDISTRIBUTED. April 12, 1996
Apr 15 1996	Petition GRANTED. SET FOR ARGUMENT October 16, 1996. *****
May 29 1996	Brief amici curiae of California, et al. filed.
May 30 1996	Joint appendix filed.
May 30 1996	Brief of petitioners Idaho, et al. filed.
May 30 1996	Brief amici curiae of Council of State Governments, et al. filed.
Jul 1 1996	Brief amicus curiae of American Civil Liberties Union filed.
Jul 3 1996	Brief of respondents Coeur d'Alene Tribe, et al. filed.
Jul 3 1996	Brief amicus curiae of United States filed.
Jul 3 1996	Brief amicus curiae of Stockbridge-Munsee Indian Community filed.
Jul 30 1996	Record filed.
Aug 5 1996	Reply brief of petitioners Idaho, et al. filed.
Aug 7 1996	Record filed.
Aug 20 1996	CIRCULATED.
Oct 16 1996	ARGUED.

941474 MAR 6 1995

In The OFFICE OF THE CLERK
Supreme Court of the United States

October Term, 1994

STATE OF IDAHO; PHIL BATT, GOVERNOR; PETE
CENARRUSA, SECRETARY OF STATE; ALAN G. LANCE,
ATTORNEY GENERAL; J.D. WILLIAMS, CONTROLLER;
ANNE FOX, SUPERINTENDENT OF PUBLIC
INSTRUCTION; KEITH HIGGINSON, DIRECTOR, DEPT. OF
WATER RESOURCES; each individually and in his official
capacity; IDAHO STATE BOARD OF LAND
COMMISSIONERS; and IDAHO STATE DEPARTMENT OF
WATER RESOURCES,

v.

Petitioners,

COEUR D'ALENE TRIBE, in its own right and as the
beneficially interested party subject to the trusteeship of the
UNITED STATES OF AMERICA; ERNEST L. STENSGAR,
LAWRENCE ARIPIA, MARGARET JOSÉ, DOMNICK
CURLEY, AL GARRICK, NORMA PEONE and HENRY
SIJOHN, individually, in their official capacity and on
behalf of all enrolled members of COEUR D'ALENE TRIBE,

Respondents.

Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Eleventh Amendment bars federal courts from hearing quiet title actions brought by Indian tribes against a State to adjudicate title to, and gain possession of, waters and submerged lands held by the State under the equal footing doctrine of the United States Constitution. The issue presented by this case is whether a federal court may nonetheless hear an action against state officers for injunctive and declaratory relief when such relief requires adjudication of the State's title and will deprive the State of all practical benefits of ownership of the disputed waters and submerged lands.
2. The President, absent an express delegation of Congress' exclusive authority over public lands, cannot convey title of uplands to Indian tribes. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). The issue presented in this case is whether the President, acting without express congressional authority, can nonetheless convey title of the beds and banks of navigable waters to an Indian tribe, thereby defeating a State's entitlement to such lands under the equal footing doctrine of the United States Constitution.

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**In The
Supreme Court of the United States**

October Term, 1994

STATE OF IDAHO; PHIL BATT, GOVERNOR; PETE
CENARRUSA, SECRETARY OF STATE; ALAN G. LANCE,
ATTORNEY GENERAL; J.D. WILLIAMS, CONTROLLER;
ANNE FOX, SUPERINTENDENT OF PUBLIC
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WATER RESOURCES; each individually and in his official
capacity; IDAHO STATE BOARD OF LAND
COMMISSIONERS; and IDAHO STATE DEPARTMENT OF
WATER RESOURCES,

Petitioners,

v.

COEUR D'ALENE TRIBE, in its own right and as the
beneficially interested party subject to the trusteeship of the
UNITED STATES OF AMERICA; ERNEST L. STENSGAR,
LAWRENCE ARIPIA, MARGARET JOSÉ, DOMNICK
CURLEY, AL GARRICK, NORMA PEONE and HENRY
SIJOHN, individually, in their official capacity and on
behalf of all enrolled members of COEUR D'ALENE TRIBE,

Respondents.

**Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of Idaho, on behalf
of the State of Idaho and the other named defendants,
petitions for a writ of certiorari to review the judgment of

the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. at 1) is reported at 42 F.3d 1244. The opinion of the district court (App. at 29) is reported at 798 F. Supp. 1443.

JURISDICTION

The court of appeals entered its judgment on December 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

The Eleventh Amendment of the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Property Clause of the United States Constitution, Art. IV, § 3, cl. 2, provides in relevant part:

The Congress shall have Power to dispose of and make all needful Rules and Regulations

respecting the Territory or other Property belonging to the United States

STATEMENT OF THE CASE

This action centers on a dispute over the ownership of the beds and banks of Lake Coeur d'Alene and its associated waterways, the Coeur d'Alene River, the Spokane River and the St. Joe River. These navigable waterways are widely known for their scenic beauty. Located in the forests of northern Idaho, the waterways are adjacent to many private homes and businesses and are heavily used by the general public for recreation, as well as for commercial transportation of raw lumber.

At one time, the waterways at issue were located within the area "withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians" by executive order on November 8, 1873. The Reservation boundaries, however, were later modified by an agreement ratified by Congress, wherein the Tribe ceded its interests in the majority of the Reservation, leaving only the lower reach of the St. Joe River and the southern third of Lake Coeur d'Alene within the boundaries of the Reservation. Act of March 3, 1891, 26 Stat. 989, 1027.

Congress opened the Coeur d'Alene Reservation to non-Indian settlement in 1906. Act of June 21, 1906, 34 Stat. 325, 335. As a result of this action, the Reservation is now largely in private ownership. The Coeur d'Alene Tribe owns less than a quarter of the lands within the reservation. The Tribe's holdings are primarily located on agricultural lands miles distant from Lake Coeur d'Alene.

Pursuant to the equal footing doctrine, Idaho assumed sovereign title to the beds and banks of all navigable waters within its borders upon its admission into the Union on July 3, 1890. Idaho has acted to protect its sovereign interests in Lake Coeur d'Alene and its associated river systems. In 1927, the State Legislature, in an unusually farsighted action, enacted legislation dedicating and preserving the waters and submerged lands of Lake Coeur d'Alene for the purposes of "scenic beauty, health, recreation, transportation and commercial purposes." Idaho Code §§ 67-4304, 67-4305 (1989). The management of Lake Coeur d'Alene and other navigable waterways is vested in the State Board of Land Commissioners, a constitutional body consisting of the governor, the attorney general, the secretary of state, the state controller, and the superintendent of public instruction. Idaho Code §§ 58-101, 58-104(9) (1994).¹

The Coeur d'Alene Tribe brought the instant action against the State of Idaho, the State Board of Land Commissioners and its members, the Department of Water Resources, and the director of the Department of Water

¹ Idaho court decisions have often reaffirmed the State's title to the Lake and its associated rivers. In 1921, the Idaho Supreme Court recognized that the State has title to the beds of Lake Coeur d'Alene below the natural high water mark. *Burrus v. Edward Rutledge Timber Co.*, 202 P. 1067 (Idaho 1921). More recently, the court, in a case in which the State was a party, confirmed that the State holds title to the beds of Lake Coeur d'Alene below the natural high water mark. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983). See also *Shephard v. Coeur d'Alene Lumber Co.*, 101 P. 591 (Idaho 1909) (Lake Coeur d'Alene is a public highway and cannot be converted to private use).

Resources. The Tribe alleged title and ownership over the beds, banks and waters of all navigable waterways within the Reservation boundaries as described in the 1873 executive order. The Tribe asked the court to quiet the Tribe's asserted title to the beds, banks and waters at issue, and to declare that the Tribe was entitled to the exclusive use and occupancy of the beds, banks and waters. It asked the court to declare invalid all Idaho statutes, ordinances and regulations purporting to regulate, authorize use, or affect in any way the beds, banks and waters at issue. It also asked the court to permanently enjoin the state officers from regulating, permitting, or taking any action in violation of the Tribe's asserted right of exclusive use and occupancy. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 (general federal question), 1343(4) (civil rights actions) and 1362 (actions brought by Indian tribes).

The State moved to dismiss the Tribe's action under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The State asserted that the Eleventh Amendment barred the court from adjudicating the State's title to the beds and banks at issue. Following briefing and argument, the district court granted the motion and dismissed the case, both on the basis of the Eleventh Amendment and on the basis that the Tribe's complaint failed to state a claim to the beds, banks and waters at issue. 798 F. Supp. at 1452, App. at 49. The Tribe appealed.

The Ninth Circuit Court of Appeals upheld the dismissal of the Tribe's claims against the State and the state agencies, but held that the Eleventh Amendment did not bar the claims for injunctive and declaratory relief against the state officers. The court began by recognizing that the

First Circuit, the Fifth Circuit, the Seventh Circuit, and even another panel of the Ninth Circuit had concluded that all actions that necessarily involve the adjudication of a State's interest in real property are barred by the Eleventh Amendment, whether or not the State is named as a defendant. 42 F.3d at 1252-53, App. at 16-17. The court interpreted some of the cases so as to distinguish them, but ultimately was faced with a decision from the Fifth Circuit squarely holding that the Eleventh Amendment bars injunctive relief requiring state officers to give up possession of property claimed by the State. The Fifth Circuit reasoned that because such an action cannot proceed without adjudicating the State's interest in the disputed property, it is equivalent to an action against the State itself. *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667, 672 (5th Cir. 1994).

The Ninth Circuit, however, rejected the reasoning of the Fifth Circuit. Instead, it concluded that under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), federal courts have the authority to require state officers to conform their actions to federal law. 42 F.3d at 1254-55, App. at 19-23. Therefore, it remanded the case back to the district court with directions to determine whether federal law vests the Tribe with ownership of the property and, if so, to require state officers to act in "accordance with what the district court finds to be the Tribe's right to the property." *Id.* at 1255, App. at 22. The Ninth Circuit did not explain, however, how this was to be accomplished without adjudicating the State's claims to the property.

In addition, the appellate court held that the President may defeat a state's entitlement to the beds and

banks of navigable waterways by transferring such lands to Indian tribes without explicit congressional authorization. 42 F.3d at 1256-57, App. at 25-27. It determined that an executive order purporting to transfer beds and banks to an Indian tribe should be analyzed under the test for conveyances of beds and banks, and not under the stricter test established by this Court for "reservations" of federal lands in *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987). 42 F.3d at 1256, App. at 25-26. The court based its decision on its belief that Indian reservations are "legally different" from other types of federal reservations and actions setting them apart should be treated as conveyances to the affected tribe. *Id.*

REASONS FOR GRANTING THE WRIT

1. The Appellate Court's Holding Allowing Actions Against State Officers For Possession Of Sovereign Submerged Lands Claimed By The State Conflicts With Prior Holdings Of This Court And Other Circuit Courts Of Appeal.

There is no issue more fundamental to the continued health of our federal system than that of maintaining the proper balance between state and federal authorities. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869). The state sovereign immunity embodied in the Eleventh Amendment has a "vital role" in our federal system. *Pennhurst State*

School & Hospital v. Halderman, 465 U.S. 89, 99 (1984). Just as the Tenth Amendment prohibits Congress from directly ordering state action, *New York v. United States*, 112 S. Ct. 2408, 2423 (1992), the Eleventh Amendment prohibits federal courts from ordering relief that operates directly against the States. The only exception is where consent to such suits is implicit in the Constitution itself. A primary example is the consent given by the States to actions brought by the federal government. *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2582 (1991). This consent acknowledges that the federal government is the proper party to seek adjudication of a State's sovereign interests when necessary to vindicate federal policies.

Nowhere is this more true than in the present case, which involves a fundamental constitutional guarantee – the State's title and control over sovereign submerged lands. Control of submerged lands is such a fundamental aspect of sovereignty that it is guaranteed to the States as part of the compact between the States and the federal government. *Shively v. Bowlby*, 152 U.S. 1, 27, 34 (1894). Any questions regarding that compact are most appropriately decided between the sovereigns. If third parties are allowed to collaterally attack state title to sovereign lands, then the State's ability to manage those lands for the benefit of its people will be put in jeopardy. Although the Ninth Circuit's decision purports to leave open the question of the State's title to submerged lands, allowing an action against state officers for possession of such lands will, for all practical purposes, deprive the State of its ownership if an injunction is issued. Such a result is at odds with the very purpose of the Eleventh Amendment

and raises a broadly significant constitutional question that should be reviewed by the Supreme Court.

The need for review is heightened by the fact that the Ninth Circuit's decision creates a conflict among the Circuit Courts of Appeal on a fundamental constitutional question. "[A] motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection" *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 688 (1993). Accordingly, the Court has often granted certiorari to resolve conflicts among the Circuits over the scope of immunity embodied in the Eleventh Amendment. E.g., *Green v. Mansour*, 474 U.S. 64, 67 (1985); *Edelman v. Jordan*, 415 U.S. 651, 658 (1974).

The conflict created by the Ninth Circuit's decision arises from a line of cases originating with this Court's split decision in *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). In *Treasure Salvors*, a salvage company discovered the wreck of the Spanish galleon *Atocha* off the Florida coast. The wreck contained valuable artifacts. The State claimed the artifacts under a state law asserting ownership of all shipwrecks on submerged lands owned by the State. *Id.* at 673. Pursuant to that law, the State and the salvage company entered into a contract whereby the company received 75% of the recovered salvage and the State received 25%. *Id.*

In an unrelated action, a federal court determined that the State did not own the submerged lands on which the shipwreck was found. *Id.* at 675. After that decision was finalized, the salvage company brought an *in rem* admiralty action to quiet its title to the artifacts recovered

from the *Atocha*. *Id.* At that time, the items were in the custody of state officers. Since the items were outside the jurisdiction of the district court, the plaintiffs obtained a warrant of arrest requiring the state officers to surrender possession of the artifacts and deliver them into the possession of a custodian appointed by the court. *Id.* at 691.

Following an appeal upholding the warrant, this Court granted certiorari to determine whether the Eleventh Amendment barred the warrant securing possession of the artifacts from the state officers. Four members of the Court concluded that the order should be upheld because the state officers holding the property were acting without legitimate authority, since the State did "not have even a colorable claim to the artifacts." *Id.* at 694. The lack of a colorable claim was based on the fact that no state statute asserted ownership of artifacts on submerged lands outside the State's jurisdiction. *Id.* at 695-96. Likewise, the contract between the State and the salvage company did not purport to provide the State title to artifacts on non-state lands. *Id.* at 694-95. Therefore, the plurality concluded, "since the state officials do not have a colorable claim to possession of the artifacts, they may not invoke the Eleventh Amendment to block execution of the warrant of arrest." *Id.* at 697. At the same time, the plurality held that the lower court's adjudication of the State's claim to the artifacts should be reversed, since such adjudication was barred by the Eleventh Amendment. *Id.* at 699-700.

Another four members of the Court, in a dissent authored by Justice White, believed that the state officers did have a colorable basis under the contract for retaining possession of the artifacts. *Id.* at 713. Therefore, they

concluded, the court could not order the state officers to surrender possession of the artifacts without reaching the merits of the State's claims. *Id.* at 716. Any inquiry into the validity of the officer's possession would, in the dissent's view, be "tantamount to deciding the question of title itself," a result barred by the Eleventh Amendment. *Id.* at 717.

Ultimately, the warrant to arrest was upheld, since Justice Brennan, in a separate opinion, concurred in the judgment allowing injunctive relief against the state officers. Justice Brennan believed that the Eleventh Amendment did not apply to the situation at all, since the suit was between a State and citizens of that same State, and therefore outside the literal language of the Eleventh Amendment. *Id.* at 700-702.

Most courts reviewing similar actions subsequent to *Treasure Salvors* have held that federal courts cannot proceed with actions (either *in rem* or against state officers) that require adjudication of state claims to property so long as the State has a "colorable" claim to the property. *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989) (*in rem* admiralty action clearly directed against Commonwealth of Puerto Rico and therefore barred by Eleventh Amendment); *Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665 (7th Cir. 1992) (*in rem* admiralty action barred necessity of adjudicating colorable state claim); *Harrison v. Hickel*, 6 F.3d 1347, 1348 (9th Cir. 1993) (affirming dismissal of quiet title claim to native allotment against state officers because the requested relief "directly affects the interests of the State of Alaska"); *Toledo, Peoria & Western R.R. Co. v. Illinois Dep't of Transportation*, 744 F.2d 1296, 1299 (7th

Cir. 1984) (barring action against state officers to gain possession of disputed lands since action is similar to retroactive relief and therefore directly impacts the State).

In the instant case, however, the Ninth Circuit viewed the prior decisions as dicta, interpreted them in such a way as to distinguish them, or simply rejected them. 42 F.3d at 1252-53, App. at 17-19. Despite the overwhelming precedents to the contrary, the Ninth Circuit determined that the State's possession of colorable title to the property, and the necessity of adjudicating that title, were not a barrier to adjudication in light of this Court's decision in *Ex parte Young* allowing prospective relief against state officers when necessary to enjoin ongoing violations of federal law. *Id.* at 1254-55, App. at 19-23.

The Ninth Circuit recognized that it was creating a conflict with other circuits when it reviewed, and expressly rejected, the Fifth Circuit's decision in *John G. & Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667 (5th Cir. 1994). In *Mauro*, the John G. & Marie Stella Kenedy Memorial Foundation (the Foundation) brought an action against the Commissioner of the Texas General Land Office, seeking an adjudication of the boundary between the Foundation's property and state-owned submerged lands. The Foundation claimed that the disputed land was not submerged land and therefore belonged to the Foundation. *Id.* at 671.

The Foundation requested that the federal court determine and declare that the Foundation was the owner of the disputed land, and that Mauro be enjoined from exercising dominion over the disputed land. *Id.* at 671. The court held that to "provide the Foundation with the

relief it requests would necessitate a determination by the district court that the State does not have title to the disputed property " *Id.* at 671-72. The court went on to state that the critical factor was that the State possessed a colorable claim to the disputed property:

The instant case is distinguishable from *Treasure Salvors* in that the defendant officials in *Treasure Salvors* had no colorable claim under which they were authorized by the State to hold these artifacts. On the other hand, the State has "owned" the property at issue in the instant case for the past century, and title was effectively adjudicated in the State in *Humble Oil*. Moreover, the *Treasure Salvors* plurality determined that the warrant of arrest issued by the district court was permissible prospective relief because it sought only possession of the property from the defendant officials and was not an *in personam* action to recover damages against the State. The relief the Foundation requests in the instant case, even if it is "possession" as against Mauro, can only be granted if the district court orders the State to relinquish its interest in the disputed property. Such relief would be the equivalent of recovering damages from the State.

Id. at 673.

Sound reasoning supports the notion that the critical factor in actions against state officers for possession of property is whether the State has a colorable claim to the disputed property. In such cases it is impossible to order the state officers to give up possession of the property without first adjudicating the validity of the State's claim. Indeed, eight of the justices in *Treasure Salvors* agreed that

the Eleventh Amendment bars actions against state officers that require adjudication of the State's claims to property. The plurality held that the Eleventh Amendment did not bar issuance of the warrant of arrest because such a process "does not require - or permit - a determination of the State's ownership of the artifacts." 458 U.S. at 699. The dissenters believed that any action filed for the purpose of litigating and deciding a State's claim to disputed property "is at the heart of the Eleventh Amendment immunity" regardless of whether the only named defendant is a state officer. *Id.* at 706.

In this case, there is no doubt, and indeed the appellate court did not question, that Idaho has a colorable claim to the beds and banks of Lake Coeur d'Alene. Under the equal footing doctrine, there is a "strong presumption" that each State has title to the beds and banks of all navigable waters within its borders. *Montana v. United States*, 450 U.S. 544, 552 (1981).

The equal footing doctrine is based on English common law principles that ownership of submerged lands is vital to the sovereign's ability to control navigation, fishing, and other public uses of water, and therefore is an essential attribute of sovereignty. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). When the 13 colonies became independent from Britain, they succeeded to the English Crown's title to the beds and banks of navigable waters. Because all subsequently admitted states enter the Union on "equal footing" with the 13 original states, they too hold title to lands under navigable waters within their boundaries. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). Title vests automatically in the State upon admission to the Union without further

action from Congress. *Shively v. Bowlby*, 152 U.S. 1, 27 (1894).

Before statehood, the United States holds submerged lands within territories in trust for future states. *Montana*, 450 U.S. at 551. Even though Congress had authority to dispose of submerged lands in order to carry out "public purposes appropriate to the objects of which the United States hold the territory," *Shively*, 152 U.S. at 48, congressional policy was to "grant away land under navigable waters only 'in case of some international duty or public exigency.'" *Utah Div. of State Lands*, 482 U.S. at 197 (quoting *Shively*, 152 U.S. at 50). Because of this overwhelming policy against conveyance, disputes regarding ownership of submerged lands must begin with the strong presumption that pre-statehood actions by Congress did not affect the future state's ownership of submerged lands. *Utah Div. of State Lands*, 482 U.S. at 197-98. This presumption can be defeated only by evidence demonstrating that Congress definitely declared or otherwise made plain its intent to defeat the equal footing entitlement of the future state. *Id.*

Thus, the only way the Tribe can prevail in this action is to rebut the strong presumption of state ownership. Under such circumstances, the appellate court erred by presuming that this case can proceed without adjudicating the validity of the State's equal footing title to the disputed lands. This case more than any other violates the rule adopted by eight of the Justices in *Treasure Salvors*: namely, that if the State has a colorable claim to the disputed property, any process that requires adjudication of that claim is barred by the Eleventh Amendment.

Review of the Ninth Circuit's opinion is further justified because it is an unprecedented expansion of the doctrine developed by this Court in *Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* doctrine is a legal fiction that allows actions against state officers to proceed on the theory that state officers, when attempting to enforce unconstitutional state statutes, are acting without the legitimate authority of the State and therefore the proceeding "does not affect the State in its sovereign or governmental capacity." *Id.* at 159. The named official must have some connection to enforcement of the allegedly unconstitutional statute, "or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." *Id.* at 157. Expansion of the doctrine is strongly disfavored. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 114 n.25 (1984) ("the authority-stripping theory of *Young* is a fiction that has been narrowly construed").²

The instant case is fundamentally different from the class of actions allowed by *Ex parte Young*. The main focus of the Tribe's action is to establish the Tribe's alleged title to the disputed beds, banks and waters. The Tribe's request to the district court to enjoin enforcement of state laws regulating the use of the disputed beds, banks and waters is secondary to, and dependent on, the

² The need for narrow construction of *Ex parte Young* is consistent with other federalism cases stressing the general principle that federal authority can be exercised against individuals, but not against states, which "possess sovereignty concurrent with that of the Federal Government." *New York v. United States*, 112 S. Ct. 2408, 2421 (1992), quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

establishment of the Tribe's title. In other words, before the district court can reach the question of the enforcement of state laws, it must decide the Tribe's title in the disputed property vis-à-vis the State. In this most fundamental portion of the case, the state officers' only role is to appear as the representative of the State, a role this Court expressly prohibited in *Ex parte Young*. 209 U.S. at 157.

Application of *Ex parte Young* is also called into question because of the nature of the disputed property. *Ex parte Young* is a procedural device that allows federal courts to assure the supremacy of federal law by enjoining state officers from enforcing unconstitutional state legislation. *Treasure Salvors*, 458 U.S. at 684-85. In the instant case, however, the State's possession of the property is derived not from state legislation, but from the act of Congress admitting Idaho into the Union on an equal footing with every other state. Idaho Admission Act, 26 Stat. 215, ch. 656, § 1. Thus, the justification for *Ex parte Young*, the need to insure the supremacy of federal law over state law, is not directly implicated here. Moreover, even if such a concern were present, it would be more properly addressed by an action between the United States and the State of Idaho, since the State has surrendered its immunity to such suits. *United States v. Texas*, 143 U.S. 621, 646 (1892). Indeed, the United States recently filed an action against the State in federal district court to determine its claims to the submerged lands at issue in this case. *United States v. Idaho*, No. 94-0328 (D. Idaho) (complaint filed July 21, 1994).³

³ The United States' action seeks to quiet title to the southern third of Lake Coeur d'Alene in the name of the United States

In summary, this case merits the Court's review. The appellate court's decision creates a fundamental conflict between the circuits on a vital Eleventh Amendment issue and greatly expands the legal fiction created in *Ex parte Young*. Allowing state title to sovereign property to be decided on the theory that such relief acts only against state officers is the ultimate elevation of form over function. It cannot be reasonably denied that such injunctive relief denies the State of all benefit of its sovereign property. Such an outcome would be abhorrent to the drafters of the Constitution, who intended for the federal judiciary to refrain from ordering relief that directly impacts a State's sovereign interests.

2. The Appellate Court's Holding That The President May Convey Submerged Lands To Indian Tribes Without Express Congressional Authorization Conflicts With This Court's Prior Holdings.

The equal footing doctrine is a fundamental constitutional guarantee to all States. Its basic principles have not changed since its first application approximately 150 years ago. The Ninth Circuit decision unfortunately ignores those long-established principles, weakens the

as trustee for the Tribe, as opposed to the Tribe's action, which seeks title to the entire Lake. The Tribe is not without a remedy if it wishes to pursue its claim to the northern two-thirds of Lake Coeur d'Alene. The Tribe may proceed against the State in state court, since Idaho has specifically waived its immunity to quiet title actions brought in state court. Idaho Code § 5-328. *See also Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (state courts have inherent authority and are presumptively competent to adjudicate claims arising under federal law).

equal footing doctrine, and threatens Idaho's sovereignty over Lake Coeur d'Alene. The decision changes 1) the established constitutional standard for determining whether a State's title to submerged lands has been denied, 2) reverses the presumption of state title in the absence of express congressional action, and 3) demotes sovereign submerged lands to the status of public domain. The lower court's decision undermining Idaho's sovereignty over Lake Coeur d'Alene is likely to affect many interests beyond those presented here and clearly conflicts with prior decisions of this Court. The decision invites conflict and creates problems for all states in which executive order reservations have been created. This is a significant constitutional question that warrants Supreme Court review.

Between 1846, when the United States acquired the area now known as Idaho from Great Britain, and 1890, when Idaho was admitted to the Union, Congress held the beds and banks of navigable waters in trust for the future State. *Montana v. United States*, 450 U.S. 544, 551 (1981). Congressional policy was to retain the submerged lands for the use of the future State except in the "most unusual circumstances." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987).

Although Congress rarely explicitly disposed of submerged lands, withdrawals and conveyances of large tracts of public lands containing submerged lands frequently occurred. The question of whether the disposition of uplands was intended to also include associated submerged lands is one that this Court has frequently addressed. The result has been two distinct tests for inferring whether congressional actions relating to public

lands were intended to defeat the future state's equal footing entitlement to submerged lands. The first test is used when Congress purports to convey an interest in submerged lands to third parties. *Montana*, 450 U.S. at 550-52. Under this test, the presumption against conveyance is overcome only where Congress' intent to convey the submerged lands was expressed in clear and especial words or definitely declared or otherwise made very plain. *Id.* at 554. Generally, conveyances are not inferred unless some international duty or public exigency compelled a conveyance. *Id.* at 552. In fact, this Court has confirmed a conveyance of submerged lands in only one, unique circumstance, that of an Indian tribe granted a fee patent to its reservation after repeated promises that the reservation would never be included in any State. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); see also *Utah Div. of State Lands*, 482 U.S. at 198 (noting that *Choctaw* was the "single case" where Supreme Court "concluded that Congress intended to grant sovereign lands to a private party").

Since a conveyance of submerged lands necessarily infers an intent to defeat a State's equal footing entitlement, this Court has adopted a second, more stringent test to use in those circumstances where Congress includes submerged lands within a federal reservation. *Utah Div. of State Lands*, 482 U.S. at 200-02. The reasoning underlying this stricter test is that a reservation of submerged lands is not necessarily inconsistent with the notion that the United States continues to hold the submerged lands in trust for the future state. *Id.* at 202. Therefore, this Court has held that congressional intent to defeat an equal footing entitlement through reservation

of submerged lands would be inferred only where Congress clearly intended to include the submerged lands within the federal reservation and where it is established that "Congress affirmatively intended to defeat the future State's title to such land." *Id.* Moreover, the Court has left open the possibility that all reservations of submerged lands are inherently insufficient to defeat a State's equal footing entitlement. *Id.* at 201.

The Coeur d'Alene Tribe bases its alleged title to the disputed beds and banks of Lake Coeur d'Alene to an Executive Order issued November 8, 1873. The Executive Order was issued pursuant to the President's general authority, not pursuant to a specific delegation of congressional authority. The appellate court stated that the Executive Order should be analyzed under this Court's test for conveyances of submerged lands, as modified by the Ninth Circuit. 42 F.3d at 1256-57, App. at 25-27. The court based its decision on the fact that a previous Ninth Circuit case involving an executive order reservation was treated as a conveyance of submerged lands to a Tribe. *Id.* at 1257, App. at 27. It also noted that this Court has treated congressional reservations in favor of tribes as conveyances for purposes of determining title to submerged lands. *Id.* at 1256, App. at 25-26.

The appellate court's opinion conflicts with numerous decisions of this Court. As discussed in *Utah Div. of State Lands*, 482 U.S. at 196-97, the power to convey submerged lands held in trust for future states is derived from the Property Clause of the United States Constitution, which provides that "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property

belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2. Repeated decisions of this Court confirm that the authority over public lands vested in Congress by the Property Clause is exclusive. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404-06 (1917). The executive branch cannot dispose of public lands absent a delegation of congressional authority. *Sioux Tribe of Indians*, 316 U.S. at 326.

In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), this Court found that Congress, by a long-term pattern of acquiescence to presidential actions, had implicitly delegated to the President the authority to *withdraw* portions of the public domain from settlement. *Id.* at 469-74. The basis for the Court's holding, however, demonstrates that this implicit delegation is limited in effect. The Court held that implicit delegation was proper because "the land laws are not of a legislative character in the highest sense of the term, . . . 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.' " *Id.* at 474 (quoting *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1904)). Therefore, the President, acting as an agent of Congress, may withdraw lands from the public domain and place them into reserved status for specific federal purposes.

The delegation of authority implied by congressional acquiescence in *Midwest Oil* is specifically limited to the reservation or withdrawal of lands from the public domain: the President cannot *convey* title of federal lands without express congressional authorization. In *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), this Court reviewed the delegation "to withdraw public lands

from sale" as found in *Midwest Oil*, and addressed "whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians." *Id.* at 326. The Court found it "significant that the executive department consistently indicated its understanding that the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations." *Id.* at 327. After reviewing this and other indications of congressional intent, the Court concluded that Congress had never delegated authority to the President to convey reservation lands to Indian tribes. *Id.* at 331. Thus, tribes occupying executive order reservations hold no title or ownership to reservation lands. *Id.* Tribes residing on executive order reservations are "tenants at the will of the Government" and hold "a mere temporary and cancellable possessory right." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176, 178 (1947). Thus, the 1873 Executive Order establishing the Coeur d'Alene Reservation acted as a setting aside of public domain land for federal purposes, not as a conveyance of property interests to the Coeur d'Alene Tribe.

In short, the Ninth Circuit's decision ordering the district court to treat the 1873 Executive Order as a conveyance of interests to the Tribe cannot be reconciled with this Court's decisions denying the Executive's power to convey title of uplands to Indian tribes. If the President cannot convey uplands to Indian tribes, he clearly cannot convey submerged lands held in trust for future states.

Given the limited and revocable nature of executive order withdrawals and reservations, the inclusion of

submerged lands within an executive order reservation is not inconsistent with the notion of continued federal trusteeship of the submerged lands for the future state.

History demonstrates that executive order withdrawals were often hastily issued in response to immediate needs. See, e.g., *Sioux Tribe of Indians*, 316 U.S. at 319-22 (describing four executive orders issued in the space of two years enlarging the Great Sioux Reservation in order to suppress liquor trafficking). It is unlikely that extensive effort was made to precisely define exclusions from executive order withdrawals and reservations. Instead, the Executive relied on statutes and general principles of law to define the actual use and final disposition of the lands withdrawn for the use of tribes. A revocable executive order should not be deemed sufficient to defeat, through implication, one of the most fundamental attributes of state sovereignty, ownership of the submerged lands within a State. Assuming for the sake of argument, however, that an executive order could ever defeat a State's title to submerged lands, it must be demonstrated, at the very minimum, that the executive order was affirmatively intended to defeat the State's equal footing entitlement, as required in *Utah Div. of State Lands* for congressional reservations of submerged lands.

This is no academic question. Rather, the Ninth Circuit's decision raises real life impacts for all States and all citizens of the United States. Executive order Indian reservations are found throughout the western United States, and many contain submerged lands. The Ninth Circuit's decision throws a cloud over many sovereign submerged lands that have for more than 100 years been administered by the States for the benefit of the general

public under the belief that only congressional acts or treaties can defeat state ownership. Suddenly, the States' title to submerged lands will be subject to attack based upon vaguely worded executive orders that were not subject to the careful scrutiny that follows from congressional action.

In summary, this case merits the Court's review, as the Ninth Circuit's decision directly conflicts with the decisions of this Court and presents an issue important to federal-state relations and tribal-state relations. If allowed to stand, the Ninth Circuit's decision will seriously undermine state claims to submerged lands within many federal reservations, contrary to this Court's decisions recognizing and protecting the equal footing entitlements of the States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COEUR D'ALENE TRIBE OF IDAHO, in its
own right and as the beneficially
interested party subject to the
trusteeship of the UNITED STATES OF
AMERICA; ERNEST L. STENSGAR;
LAWRENCE ARIPIA; MARGARET JOSE;
DOMNICK CURLEY; AL GARRICK; NORMA
PEONE; HENRY SIJOHN, individually,
in their official capacity and on
behalf of all enrolled members of
the COEUR D'ALENE TRIBE OF IDAHO,

Plaintiffs-Appellants,

v.

STATE OF IDAHO; CECIL D. ANDRUS,
Governor; PETE CENARRUSA, Secretary
of State; LARRY ECHOHAWK, Attorney
General; J.D. WILLIAMS, Auditor;
JERRY EVANS, Superintendent of
Public Instruction; KEITH HIGGINSON,
Director, Dep't of Water Resources,
each individually and in his official
capacity; IDAHO STATE BOARD OF LAND
COMMISSIONERS; IDAHO STATE
DEPARTMENT OF WATER RESOURCES,

Defendants-Appellees.

No. 92-36703

D.C. No.
CV 91-437-HLR

OPINION

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

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Argued and Submitted
February 2, 1994 – Seattle, Washington

Filed December 9, 1994

Before: Eugene A. Wright, Thomas M. Reavley,* and
Edward Leavy, Circuit Judges.

Opinion by Judge Leavy

COUNSEL

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Funke, Coeur d'Alene, Idaho, for the plaintiffs-appel-
lants.

Steven W. Strack, Deputy Attorney General, Boise, Idaho,
for the defendants-appellees.

OPINION

LEAVY, Circuit Judge:

An Indian tribe brought this action against a state, state agencies, and state officials for quiet title, injunctive relief, and declaratory relief. The district court dismissed all the claims on the grounds of Eleventh Amendment immunity and failure to state a claim. The Indian tribe appeals. We affirm in part, reverse in part, and remand.

*Honorable Thomas M. Reavley, Senior Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

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FACTS

The Coeur d'Alene Indian Tribe (the Tribe) brought this action in federal district court in Idaho naming the State of Idaho, several state agencies (the Agencies), and several state officials (the Officials) as defendants. The Tribe claims title to all of the submerged lands within the boundaries of its reservation that were established by Executive Order on November 8, 1873, and ratified by Congress in 1891, 26 Stat. 543, § 19 (1981), including Lake Coeur d'Alene. The Tribe alternatively claims ownership of these lands pursuant to unextinguished aboriginal title. The Tribe's claim to these lands includes a claim to the water on the land. The Tribe brought this suit to quiet title to these lands and waters in its name, and for declaratory and injunctive relief to preclude regulation or interference with possession by the Agencies and Officials.

Defendants moved to dismiss the Tribe's complaint on Eleventh Amendment immunity grounds, and for failure to state a claim upon which relief could be granted. The district court dismissed the Tribe's entire claim. *Coeur d'Alene Tribe of Idaho v. Idaho*, 798 F. Supp. 1443 (D. Idaho 1992). The court concluded that the Eleventh Amendment barred the claims against Idaho and the Agencies. *Id.* at 1448. The district court also concluded that the claims against the Officials for quiet title and declaratory relief were barred by the Eleventh Amendment because these claims were the functional equivalents of a damage award against the State. *Id.* at 1448-49. Finally, the district court dismissed the claim for injunctive relief against the Officials, holding that as a matter of law, Idaho is in rightful possession of the land at issue. *Id.* at 1452.

We agree that the Eleventh Amendment bars all claims against the State and the Agencies, as well as the quiet title claim against the Officials, and affirm the district court's judgment on these claims. To the extent that the claims for injunctive and declaratory relief against the Officials seek only to preclude future violations of federal law, we conclude that these actions are not barred by the Eleventh Amendment, and reverse the district court's judgment on these claims. Because the Tribe has an arguable claim to ownership of the property at issue, we also reverse the district court's dismissal for failure to state a claim.

DISCUSSION

I. *Idaho and State Agency Defendants*

With limited exceptions, a state's sovereign immunity as recognized by the Eleventh Amendment of the United States Constitution bars suit against it in federal courts. The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the Eleventh Amendment by its terms bars only actions brought by citizens of sister states or foreign countries, the Supreme Court "has recognized that [the Eleventh Amendment's] greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III."

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) (hereinafter *Pennhurst*). "[T]he Eleventh Amendment . . . stand[s] not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact [and] that the judicial authority in Article III is limited by this sovereignty. . . ." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S. Ct. 2578, 2581 (1991) (citations omitted). A state's Eleventh Amendment immunity applies to suits in equity as well as in law, *Missouri v. Fiske*, 290 U.S. 18, 27 (1933), and to state agencies as well as states, *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982); *Almond Hill Sch. v. United States Dep't of Agric.*, 768 F.2d 1030, 1034 (1985). This immunity can only be surrendered in the plan of convention, waived by the state, or abrogated by Congress. *Almond Hill Sch.*, 768 F.2d at 1034-35. None of these limitations on Idaho's Eleventh Amendment immunity applies here.

A. *The Plan of Convention*

The plan of convention implicitly surrenders the states' immunity to certain other sovereigns when the states enter the Union. See *Blatchford*, 111 S. Ct. at 2582. The Supreme Court has recognized only two sovereigns to which every state has surrendered its immunity through the plan of convention: sister states, *South Dakota v. North Carolina*, 192 U.S. 286 (1904), and the United States, *Blatchford*, 111 S. Ct. at 2582; *United States v. Texas*, 143 U.S. 621 (1892).

In *Blatchford*, the Court held that the plan of convention does not surrender the states' immunity to Indian tribes in an action for damages. 111 S. Ct. at 2583. The Court had previously held that because Indian tribes were not parties to the constitutional convention, the tribes could not have consented to suit in the convention. *Id.* at 2583 (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991)). Because "[w]hat makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession," *id.* at 2582, the Court reasoned that the lack of mutuality of any waiver of immunity to suit by tribes necessarily led to the conclusion that the states also had not accepted such a waiver in the plan of convention. *Id.* at 2583.

Although *Blatchford* involved only an action for damages, its reasoning applies equally to actions for injunctive relief, because Indian tribes are also immune from actions by states for injunctive relief. *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983); *California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979). It is well-established that a state's Eleventh Amendment immunity bars suits against the state and state agencies for equitable relief as well as for damages. *Pennhurst*, 465 U.S. at 100. If the states did not surrender their immunity from suit by tribes for damages through the plan of convention, we fail to see how they could have surrendered their immunity from suit for injunctive or declaratory relief.¹

¹ *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (1991), does not hold otherwise. Despite the language in

B. Consent to Suit

A state may waive its privilege of immunity from suit. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). To waive its Eleventh Amendment immunity, a state must unequivocally express its consent to be sued. *Pennhurst*, 465 U.S. at 99. The Tribe claims that Idaho has waived its immunity in three ways.

First, the Tribe argues that Idaho courts have waived the state's immunity by ruling that actions against the state to quiet title are not claims against the sovereign.² *Lyon v. State*, 283 P.2d 1105, 1106 (Idaho 1955); *Roddy v. State*, 139 P.2d 1005, 1010 (Idaho 1943). In *Lyon*, the Idaho Supreme Court rejected the state's motion to dismiss due to common law sovereign immunity because "[t]he appellants by the proceeding [to quiet title] are asserting no claim against the sovereignty, but are attempting to retain what they allegedly own." *Lyon*, 283 P.2d at 1106. The Tribe concludes that Idaho and the Agencies have no

that case, which in many places is directed against the State of Alaska, we specifically held only that "the eleventh amendment does not bar the plaintiffs' request for injunctive [and declaratory] relief against the Commissioner of the Department of Health and Social Services." *Id.* at 552 (emphasis added).

² Stated another way, the Tribe argues not that the state waived its immunity, but rather that the state *had* no immunity to waive. Restating the argument does not alter the result, however. The Tribe names the state and the Agencies as defendants, and is clearly attempting to sue them in federal court. As the state's Eleventh Amendment immunity is immunity from suit of any kind, the state court's characterization of a particular action cannot overcome this bar.

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Eleventh Amendment immunity in a proceeding to quiet title such as this one.

We disagree. A state's immunity from suit in state court as determined by a state court is not necessarily coextensive with Eleventh Amendment immunity from suit in federal court. See *Edelman v. Jordan*, 415 U.S. 651, 677 n. 19 (1974) ("Whether [the state] permits such a suit to be brought against the State in its own courts is not determinative of whether [it] has relinquished its Eleventh Amendment immunity from suit in the federal courts."); *Aquilar v. Kleppe*, 424 F. Supp. 433, 436 (D. Alaska 1976) ("prohibition placed on the power of the federal judiciary by the eleventh amendment exceeds the common law doctrine of sovereign immunity"). We will not infer a waiver of Eleventh Amendment immunity based on a state court holding that no sovereign immunity bars its own jurisdiction.

Second, the Tribe argues that Idaho waived its Eleventh Amendment immunity by adopting the Idaho Constitution, which disclaims any interest in Indian lands within the state. The Idaho Constitution provides:

And the people of the state of Idaho do agree and declare that we forever disclaim all right and title . . . to all lands lying within [the state of Idaho] owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States

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Idaho Const. art. 21, § 19. We have held that virtually identical language in other state constitutions does not constitute a waiver of Eleventh Amendment immunity from suit by Indians or Indian tribes. See *Harrison v. Hickel*, 6 F.3d 1347, 1354 (9th Cir. 1993) (Alaska Statehood Act disclaiming "all right and title . . . to any lands . . . the right or title to which may be held by any" native, not sufficient to waive Alaska's Eleventh Amendment immunity to suit by Indian claimants to quiet title to disputed land (quoting Alaska Statehood Act, § 4, Pub. L. No. 85-508, 72 Stat. 339 (1958))); *Skokomish Indian Tribe v. France*, 269 F.2d 555, 562 (9th Cir. 1959) (Washington State Constitution disclaiming forever any right and title to "all lands lying within [the state] owned or held by any Indian or Indian Tribes" not sufficient to waive Washington's Eleventh Amendment immunity to suit by Indian tribe to quiet title to disputed land (quoting Wash. Const. art. XXVI, § 2)). We likewise conclude that Idaho did not waive its immunity from suit by Indian tribes in its constitution.

Finally, the Tribe argues that Idaho waived its immunity from Indian land claims by agreeing in its constitution that Congress has absolute jurisdiction and control over Indian lands. Idaho Const. Art. 21, § 19. It further argues that Congress exercised that control by granting tribes the right to sue the state in federal court pursuant to 28 U.S.C. § 1362.³

³ 28 U.S.C. § 1362 provides:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy

We conclude that this argument is foreclosed by the Supreme Court's holding in *Blatchford*. In that case, the Court rejected the argument that Congress had delegated to the tribes the federal government's exemption from state sovereign immunity by enacting 28 U.S.C. § 1362. 111 S. Ct. at 2584. We fail to see a significant difference in the Tribe's argument here. If Idaho waived its immunity from suit through its constitution by recognizing that Congress alone has jurisdiction over Indian lands, the waiver was in favor of the United States only. We can find no reason to read more into section 1362 on behalf of tribes suing Idaho than the Supreme Court did on behalf of native villages suing Alaska. We thus affirm the district court's dismissal of the action against Idaho and the Agencies.

II. Defendant State Officials

Generally, state officials in their official capacities are considered to be acting on behalf of the state, and the Eleventh Amendment therefore shields them from suit. See *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Pennhurst*, 465 U.S. at 101-02. The courts have, however, fashioned narrow exceptions to this rule. A plurality of the Supreme Court provided the following test to determine whether a suit against state officials is barred by the Eleventh Amendment:

(a) Is this action asserted against officials of the State or is it an action brought directly

arises under the Constitution, laws, or treaties of the United States.

against the State . . . itself? (b) Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? (c) Is the relief sought by [plaintiffs] permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury?"

Treasure Salvors, 458 U.S. at 690 (quoting *Quern v. Jordan*, 440 U.S. 332, 346-47 (1979)).⁴ The Tribe must prevail on each part of this three-part test or the Eleventh Amendment bars the action against the Officials.

A. Real Party in Interest

When, as here, public officials are the nominal defendants, "a question arises as to whether [the] suit is a suit against the State itself." *Pennhurst*, 465 U.S. at 101.

"The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act."

Id. at 101 n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (internal quotations omitted)).

⁴ Although *Treasure Salvors* was an *in rem* admiralty action, the Court noted "the question presented for our decision would not be any different if the State merely resisted an attachment of property located within the district." *Id.* at 683. The test therefore applies to this action.

While this would appear to preclude relief in this case, the courts have established an important exception to this general rule. An action claiming that state officials are violating federal law is deemed not to be an action against the state, and thus is not barred by the state's immunity. See *Pennhurst*, 465 U.S. at 102 ("a suit challenging the constitutionality of a state official's action is not one against the State"); *Almond Hill Sch.*, 768 F.2d at 1034 (exception applies to alleged violations of federal statutes).

Under our federalist system, the states are considered unable to act in a manner contrary to federal law. Thus any action on the part of state officials that violates federal law cannot be attributed to the state. *Ex parte Young*, 209 U.S. 123, 159-60 (1908). Because federal law preempts state law, if the property at issue in this case belongs to the Tribe pursuant to federal law, the Officials must conform their actions to that federal law in spite of state statutes that purport to regulate the property as belonging to the state. If the Officials do not act in accordance with federal law, the state's claim of ownership cannot clothe the Officials in Eleventh Amendment immunity from suit.

This case fits within the exception. The Tribe alleges that it holds the property at issue pursuant to an executive order that was ratified as a federal statute. See 26 Stat. 543 § 19 (1891). Because the Tribe has alleged that the actions of the Officials in exercising control over the property at issue violate this federal law, the Officials must be considered the real parties in interest in the claims against them.

B. Violation of Federal Law vs. Tortious Conduct

Under the second prong of the test, we ask whether the challenged conduct either violates federal law, or is wholly unauthorized by state law. If state officials act within the authority of state law and violate no federal rights, their interference with a plaintiff's legal rights is merely tortious, and is protected by the Eleventh Amendment. *Treasure Salvors*, 458 U.S. at 692-697; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 692 (1949).

The Supreme Court has recognized that the determination of whether a plaintiff's federal rights are being violated may ultimately depend on the decision that the court reaches on the merits of the claim. *Larson*, 337 U.S. at 690. Thus, a plaintiff need only adequately allege an ongoing violation of a federal right to meet this prong of the test. *Cf. id.* at 690 n.10 (dismissal for lack of jurisdiction is proper if claim of violation of federal law is clearly frivolous or insubstantial); *Tindal v. Wesley*, 167 U.S. 204, 216 (1897) ("It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration"). The possibility that a defendant will ultimately prevail on the merits does not clothe that defendant in Eleventh Amendment immunity.⁵ See *Scheuer v. Rhodes*, 416 U.S.

⁵ We have previously held that where the plaintiff does not allege a violation of federal law, but rather alleges that the defendant lacked authority for his or her actions pursuant to state law, the Eleventh Amendment will bar the action unless the defendant had no colorable state authority for his or her actions. See *Marx v. Government of Guam*, 866 F.2d 294, 299-300 (9th Cir.

232, 238 (1974). The Tribe adequately alleges an ongoing violation of a federal right and, thus, meets this prong of the test.

C. Remedy Sought

The third and final prong of the test is whether the relief sought is permissible prospective relief, or is instead comparable to damages. "The eleventh amendment bars . . . suits against . . . state officials in their official capacity when the relief sought is *retrospective* in nature, i.e. damages." *Ulaleo v. Paty*, 902 F.2d 1395, 1398 (9th Cir. 1990). Although it has often been stated that the Eleventh Amendment forbids relief that would require the payment of funds from the state treasury, the overriding question is whether the relief sought would remedy *future* rather than *past* wrongs. An injunction that will in practical effect require payment of funds out of the state treasury is nonetheless permissible if it requires only that officials conform their future actions to federal law. *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

The Supreme Court has long held that an action against state officials to enjoin an ongoing violation of federal law is not precluded by virtue of the fact that the determination of the controversy necessarily involves a

1989) (citing *Treasure Salvors*, 458 U.S. at 682). We do not take either *Treasure Salvors* or *Marx* to mean that a state official is immune from an action seeking to enjoin him or her from violating federal law if the official's interpretation of federal law is colorable. Such a holding would constitute a marked departure from previous Eleventh Amendment jurisprudence.

question of the state ownership of property. *Treasure Salvors*, 458 U.S. at 685-87; *Tindal*, 167 U.S. at 213-222; *Ex parte Tyler*, 149 U.S. 164, 190 (1893).⁶ As the Court stated in *Tindal*:

The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the state simply because the defendant holding possession happens to be an officer of the state and asserts that he is lawfully in possession on its behalf.

Tindal, 167 U.S. at 221.⁷

⁶ The same principle allows injunctive relief against federal officials without the consent of the United States for the wrongful interference with property. *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-21 (1912); *United States v. Lee*, 106 U.S. 196, 210-11 (1882). Although cases against federal officials are no longer necessary because the United States has waived its sovereign immunity to actions to quiet title, 28 U.S.C. § 2409a, the underlying principle remains valid. See *Block v. North Dakota*, 461 U.S. 273, 281-82 (1983).

⁷ The Fifth Circuit has held that the Supreme Court overruled *Tindal* in *Larson*, 337 U.S. 682, and that this line of cases therefore provides no support for the proposition that an action for an injunction against a state official to deliver possession of property is not barred by the Eleventh Amendment. *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667, 673 (5th Cir. 1994) (citing *Pennhurst*, 465 U.S. at 110 n.19). We respectfully disagree. *Pennhurst* concludes that to the extent that *Tindal* was a tort case, it was overruled by *Larson*. However, to the extent that *Tindal* alleged a violation of a federal right, it clearly remains valid. See *Treasure Salvors*, 458 U.S. at 685-89 (Stevens, J., plurality opinion), 706 (White, J., concurring and dissenting).

The Supreme Court's latest opinion involving property claimed by a state is *Treasure Salvors*. While the circuit courts have reached varying conclusions based upon that case, we think that it established two clear rules that are relevant to the case before us. First, federal courts may not hear actions to quiet title to property in which the state claims an interest, without the state's consent. *See id.*

Second, declaratory and injunctive relief against state officials to foreclose future violations of federal law is available even if that relief works to put the plaintiff in possession of property also claimed by the state. *See id.* While the conflict between these two rules presents a conceptual difficulty that perhaps cannot be resolved logically, we are nevertheless bound by both. *See Manypenny v. United States*, 948 F.2d 1057, 1069 n.4 (8th Cir. 1991) (Gibson, J., concurring and dissenting).

The Officials rely on several circuit and district court cases that have held that declaratory and injunctive relief that necessarily involves the adjudication of a state's interest in real property is comparable to damages, and therefore precluded in the absence of the state's consent. *See Mauro*, 21 F.3d 667, 673 (5th Cir. 1994); *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16, 18 (1st Cir. 1989); *Toledo, Peoria & Western R.R. v. Illinois Dep't of Transp.*, 744 F.2d 1296, 1299 n.1 (7th Cir. 1984) *cert. denied*, 470 U.S. 1051 (1985); *Aquilar v. Kleppe*, 424 F. Supp. 433, 437 (D. Alaska 1976). A case recently decided by this court appears to support this conclusion. *See Harrison v. Hickel*, 6 F.3d 1347, 1348 (9th Cir. 1993).

Some of these cases are distinguishable. *Toledo, Peoria & Western* held only that "[t]he eleventh amendment bars a federal action against state officials based on state law when the relief sought directly impacts the state." 744 F.2d at 1299 (emphasis added). The plaintiff's claims of violations of federal rights in that case were defeated by the availability of a remedy in the Illinois Court of Claims,⁸ which left only state law claims. Any support found in that case for the proposition that a federal claim against state officials for possession of property is precluded if it is "an action nominally against the [state] officials but in fact against the state," *id.*, is thus dicta.

We read the Ninth Circuit and District of Alaska cases to mean only that an action that would conclusively adjudicate the state's title to property cannot be brought without the state's consent. *See Harrison*, 6 F.3d at 1348 (affirming dismissal of claims against individual defendants "because the quiet title relief sought . . . directly affects the interests of the State"); *Aquilar*, 424 F. Supp. at 437 (plaintiffs sought to have the court "declare certain portions of the patents void *ab initio*"). While these cases could admittedly be read to support a holding that injunctive relief against a state official is barred if the official holds the disputed property based on the state's claim of ownership, such a reading is foreclosed by Supreme Court precedent.

⁸ Actions that involve federal claims of takings without just compensation or due process can be defeated by a showing that the state provides a post-deprivation remedy. *Larson*, 337 U.S. at 697 n.18. In contrast, states cannot provide a remedy for the taking of Indian lands that are held pursuant to federal law. *See* 25 U.S.C. § 177.

The First Circuit case *Fitzgerald* and the Fifth Circuit case *Mauro* are more difficult to reconcile. We note that like *Toledo, Peoria & Western*, *Fitzgerald* did not involve a claim of violations of federal law. However, the case appears to hold that when an action includes the state and state agencies as defendants, and seeks an adjudication of the state's interest in property, that portion of the action that is against state officials for injunctive and declaratory relief is also directed against the state itself, and is therefore barred. *Fitzgerald*, 866 F.2d at 18.

In *Mauro*, the plaintiff alleged that the defendant state official was depriving the plaintiff of its property without due process of law. 21 F.3d at 672. The plaintiff sought injunctive relief forbidding the leasing of the property for mineral development, as well as a declaration of title. The Fifth Circuit held that all of the relief sought was barred by the Eleventh Amendment because "a federal court does not have the power to adjudicate the State's interest in property without the State's consent." *Id.* The court refused to hear the claims for declaratory and injunctive relief against the state official because it believed that to do so it would have to adjudicate the state's interest in the property.

Although the Fifth Circuit attempted to distinguish *Treasure Salvors*, *id.* at 673, we do not find its reasoning persuasive. As in *Mauro* and *Fitzgerald*, the plaintiffs in *Treasure Salvors* asked that they be declared the owners of property as against the state. The Supreme Court held that while this relief was barred by the Eleventh Amendment, the ancillary claims for declaratory and injunctive relief against state officials could go forward. 458 U.S. at 684.

On an initial reading, the logic underlying *Fitzgerald* and *Mauro* seems compelling. Starting from the indisputable proposition that a federal court may not adjudicate the state's interest in property without the state's consent, *Treasure Salvors*, 458 U.S. at 682, the outcome of these cases (that the state officials are also protected by the Eleventh Amendment) appears inevitable. On the other hand, reasoning from the equally indisputable proposition that a "federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury," *Quern*, 440 U.S. at 337, leads to the ultimate conclusion that a quiet title action should be permissible. Thus while both propositions are valid, their ultimate logical conclusions are faulty. The Supreme Court has charted a middle ground between the necessarily conflicting doctrines of state sovereign immunity and the supremacy of federal law. It should come as no surprise that that middle ground does not wholly conform to either doctrine.

Following *Ex parte Young*, we have had little difficulty concluding that an injunction against a state official forbidding the enforcement of a state law is not an injunction against the state if the state law conflicts with federal law. See, e.g., *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992); *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 552 (9th Cir. 1991).⁹ At the

⁹ Ironically, *Ex parte Young*, which is generally credited for establishing this exception, followed what was already a well-

time of *Ex parte Young*, the conceptual difficulty was with actions that restrained the state from acting through its officials to enforce state laws, rather than with actions that implicated the state's ownership of property. The Supreme Court's reply to this difficulty is equally valid today, although it would perhaps be better stated inversely:

The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject matter. In the case of the interference with property the person enjoined is assuming to act in his capacity as an official of the State, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, where the state official, instead of directly interfering with tangible property, is about to commence suits, which have for their object the enforcement of an act which violates the Federal Constitution . . . he is seeking the same justification from the authority of the State as in other cases. The sovereignty of the State is, in reality, no more involved in one case than in the other. The State cannot in either case impart to the official immunity from

established rule that a state official who claimed to hold property on behalf of the State could be sued in federal court without the State's permission and required to deliver possession of the property to its rightful owner. See *Ex parte Young*, 209 U.S. at 167 (citing, *In re Ayers*, 123 U.S. 443, 507 (1887)); *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738 (1824).

responsibility to the supreme authority of the United States.

209 U.S. at 167.

Cases involving property claimed by the state do, however, present an additional difficulty in that the fiction that an action in violation of federal law cannot be an action of the state breaks down when confronted by the state's claim of title to property. Whatever else a state can or cannot do, it apparently can claim title to property in derogation of federal law. In such an instance, the state is protected from suit by the Eleventh Amendment. However, this creates no exception to the rule that when federal law conflicts with the state's claim, state officials must act in conformance with federal law, and can be compelled to do so by the federal courts. To resolve this conundrum, courts have allowed all relief other than relief that would foreclose the State's claim in future judicial proceedings. See *Treasure Salvors*, 458 U.S. at 699-700; *Tindal*, 167 U.S. at 223; *Zych v. Wrecked and Abandoned Vessel Believed to be the Lady Elgin*, 960 F.2d 665, 670 (7th Cir.) cert. denied, 113 S. Ct. 491 (1992); *Florida Dep't of State v. Treasure Salvors*, 689 F.2d 1254, 1256 (5th Cir. 1982) (per curiam, quorum opinion) (hereinafter *Treasure Salvors II*).

We thus affirm the district court's dismissal of the quiet title claim. However, because the injunctive and declaratory relief sought by the Tribe would not compensate for past violations of federal law, but would instead preclude future violations, we conclude that this portion of the action is not barred by the state's immunity. The Tribe is not seeking to have any past violations of its

federal rights redressed in any way. It is not seeking damages or restitution for past wrongs, *compare Edelman*, 415 U.S. at 668-69, nor is it seeking to rescind a past transfer of property, *compare Ulaleo*, 902 F.2d at 1399-1400. Rather, it seeks a determination under federal law of the Tribe's right to possess, use, and control the beds, banks, and waters of navigable waterways within the Coeur d'Alene Reservation in the future. Thus to the extent that the declaratory and injunctive relief binds state officials in accordance with what the district court finds to be the Tribe's right to the property, it is allowable. Because the state is unable to act in violation of federal law, declaratory relief that determines what federal law *is* and requires state officials to act accordingly cannot be considered relief against the state. We follow the Fifth Circuit's disposition of *Treasure Salvors* after remand from the Supreme Court, and conclude that if the district court finds that the property at issue belongs to the Tribe pursuant to federal law, it may decree the Tribe to be the owner of the property against all claimants except the State of Idaho and its agencies. *See Treasure Salvors II*, 689 F.2d at 1256; *Zych*, 960 F.2d at 670.

We recognize that if the Tribe ultimately prevails on the merits of this case, neither Idaho nor the Tribe will hold unclouded title to the property. The plaintiffs in *Treasure Salvors* apparently complained of just such a problem subsequent to the Supreme Court's disposition of that case. *See Treasure Salvors II*, 689 F.2d at 1256. Our conclusion undoubtedly will not satisfy any of the parties involved. However, just as we may not exercise jurisdiction over the state to more fully resolve this controversy, we may not decline jurisdiction to the extent that it exists.

See Ex parte Young, 209 U.S. at 143. We will not refuse to enforce the federal rights of Indian tribes against action by state officials merely because we cannot afford them complete relief.

III. Section 1983

None of the claims discussed above differ when analyzed under 42 U.S.C. § 1983. To the extent that Eleventh Amendment immunity bars the Tribe's claims, section 1983 does not help them. *See Edelman*, 415 U.S. at 677. To the extent that the suit is for prospective injunctive relief and is not barred by the Eleventh Amendment, a state official may be sued in his or her official capacity under section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).

The Tribe argues that the individual plaintiffs have permissible section 1983 claims against the officials acting in their individual capacities. We agree. Injunctive relief is available against state officials in their individual capacities under section 1983. *Hale v. Arizona*, 967 F.2d 1356, 1369 (1992), *rev'd on other grounds*, 993 F.2d 1387 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 386 (1993). Although the plaintiffs do not appear to be seeking any additional relief against the defendant officials as individuals, the action against them is proper in either capacity. Of course, they may have defenses available to them as individuals that are not available to them as officials. *See Kentucky v. Graham*, 473 U.S. at 166-67.

IV. Dismissal for Failure to State a Claim

The district court held that the Tribe failed to state a claim on which relief could be granted. 798 F. Supp. at 1446. In its complaint, the Tribe alleges that it holds title to the submerged land pursuant to an Executive Order executed prior to the time that Idaho attained statehood. Such title, if proven, would defeat the officials' claim that they have authority to hold and regulate the property pursuant to the State's ownership. *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1257-59 (9th Cir. 1983).

When a state enters the union it takes title to all submerged land beneath navigable waters unless the United States has conveyed that land prior to statehood. *Montana v. United States*, 450 U.S. 544, 551 (1981). Although there is a strong presumption against conveyance, that presumption is rebuttable. *Id.* at 552.

In *Montana v. United States*, the Supreme Court considered a tribe's claim of title to the bed of a navigable river as it flowed through the tribe's reservation. 450 U.S. at 550-57, 101 S. Ct. at 1250-54. The Court's analysis of this issue starts from the premise that "[a] court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States, . . . and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made very plain.'" (citations omitted)

Puyallup, 717 F.2d at 1257 (citing *Montana* at 552).

To make this showing, the Tribe may rely on evidence beyond the federal enactment that established the reservation. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631-35

(1970) (considering meaning parties likely gave to treaty language); *Montana*, 450 U.S. at 556 (considering evidence of Tribe's life-style at time of reservation); *United States v. Aam*, 887 F.2d 190, 195 (9th Cir. 1989) ("inquiry focus[es] on the circumstances surrounding the creation of the reservation").

The State argues that as a matter of law the Executive Order of 1873 by its terms could not have transferred the submerged lands to the Tribe. This argument, however, fails for a variety of reasons.

The State first analogizes the language of the 1873 Executive Order ("withdrawn from sale and set apart as a reservation") to the language in *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), ("reserved from sale as the property of the United States") which the Supreme Court found insufficient to create a "reservation" of interest in submerged land. 482 U.S. at 203. Based on this analogy, the State concludes that the federal government cannot "reserve" submerged lands in a manner sufficient to withstand the "equal footing doctrine".

The "reservation" at issue here, however, is legally different from the "reservation" before the Supreme Court in *Utah Div. of State Lands*. In that case the issue was whether the federal government, by a general land law, could reserve *for itself* interests in submerged lands that would not be transferred upon admission to the state under "equal footing." In its 1987 opinion, the Supreme Court stated explicitly that it had *never* before decided whether the federal government's "reservation" of submerged lands could prevent title from passing to a state upon admission to the Union under the "equal footing"

doctrine. 482 U.S. at 200-01. Yet, in *Montana*, decided six years earlier, the Supreme Court had already dealt with an Indian reservation created by language very similar to that at issue in the present appeal,¹⁰ and explicitly treated the interest possessed by Indians in a "reservation" as a "grant" or "conveyance." 450 U.S. at 554. Given this prior holding, it is clear that the meaning of "reservation" in *Utah Div. of State Lands* is to be distinguished from the meaning of "reservation" when applied to the creation of Indian title. Thus, *Utah Div. of State Lands* is not applicable to the present case.

The State also argues that the President could not convey submerged lands by an executive order without express congressional authorization and that no implied authorization could justify such a conveyance. The State argues, without citing to any authority, that executive orders creating an interest in bedlands must be issued with explicit prior congressional approval or subsequent ratification. Since there was no ratification of the 1873 Executive Order creating the Coeur d'Alene reservation prior to Idaho's admission to statehood, the State argues that title to the bedlands passed to it under the equal footing doctrine. In support of this argument, the State

¹⁰ Article II of the 1868 Treaty with the Crow Indians, at issue in *Montana*, provides in part: "The United States agrees that the following district of country [is] . . . set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . ". 15 Stat. 650 (1869). The present appeal involving the Executive Order of 1873 used the terms, "withdrawn from sale and set apart." Variation on such language is typical of Indian agreements creating reservations. See F. Cohen, *Handbook of Federal Indian Law*, 477 (1982).

notes that other court decisions finding an executive order conveyance of bedlands to Indians have all been supported by explicit congressional authorization.

This, however, does not appear to be the case. The State, for example, relies on *Puyallup*, 717 F.2d at 1251, to support its contention. It argues that although we found that the executive order conveyed title to a riverbed, the district court had found that the executive order had been issued pursuant to Article II of the Treaty of Medicine Creek, 10 Stat. 1132 (1854). *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F. Supp. 65, 72 (W.D. Wash 1981). In fact, the treaty makes no reference whatsoever to conveyance of riverbeds nor does it provide any authorization for the President to convey such lands. If the State's contention were true, we would have denied the Tribe's claim of the riverbed due to lack of explicit congressional authorization to convey riverbeds.

We can find no decision which mentions the rationale offered by the state as a possible ground for denying a tribal claim. Two of our fairly recent cases denied tribal claims for riverbeds in relation to reservations created in part by executive order.¹¹ Nowhere in our opinions did we consider the possibility that such a claim might be defeated by a lack of explicit congressional authorization of the executive order.

As it is conceivable that the Tribe could prove facts that would entitle it to the relief sought, dismissal for failure to state a claim was error.

¹¹ *United States v. Aam*, 887 F.2d 190 (9th Cir. 1989); *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983).

Additionally, the Coeur d'Alene tribe states a claim in Count One of their complaint for a declaratory judgment concerning aboriginal title to the beds and banks of all navigable waters within the 1873 Reservation which they allege has never been ceded or extinguished. The district court without discussion improperly dismissed this claim under Rule 12(b)(6). On remand the district court should resolve the issue of whether the Tribe is entitled to declaratory relief.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party shall bear their own costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE)
OWNERSHIP OF THE BEDS AND)
BANKS AND ALL WATERS OF)
ALL NAVIGABLE WATER)
COURSES WITHIN THE 1873)
COEUR D'ALENE RESERVATION)
BOUNDARY.)

COEUR D'ALENE TRIBE OF)
IDAHO, in its own right and as)
the beneficially interested party)
subject to the trusteeship of the)
UNITED STATES OF AMERICA;)
ERNEST L. STENSGAR,)
LAWRENCE ARIPIA, MARGARET)
JOSÉ, DOMNICK CURLEY, AL)
GARRICK, NORMA PEONE and)
HENRY SIJOHN, individually, in)
their official capacity and on)
behalf of all enrolled members of)
the COEUR D'ALENE TRIBE OF)
IDAHO,)

Plaintiffs,)

v.)

STATE OF IDAHO; CECIL D.)
ANDRUS, GOVERNOR; PETE)
CENARRUSA, SECRETARY OF)
STATE; LARRY ECHOHAWK,)
ATTORNEY GENERAL; J.D.)
WILLIAMS, AUDITOR; JERRY)
EVANS, SUPERINTENDENT OF)
PUBLIC INSTRUCTION; KEITH)

CIVIL NO.
91-0437-N-HLR

HIGGINSON, DIRECTOR, DEPT.)
 OF WATER RESOURCES; each)
 individually and in his official)
 capacity; IDAHO STATE BOARD)
 OF LAND COMMISSIONERS; and)
 IDAHO STATE DEPARTMENT OF)
 WATER RESOURCES,)
 Defendants.)
 _____)

ORDER GRANTING MOTION TO DISMISS

I. FACTS AND PROCEDURE

This action was filed on October 15, 1991. The Complaint by the Coeur d'Alene Indian Tribe of Idaho and various individual tribe members (hereinafter collectively referred to as the "Tribe") against the State of Idaho and various state officials and agencies, seeks an order from the court quieting title in the Tribe to the beds, banks, and waters of all navigable watercourses within the 1873 boundaries of the Coeur d'Alene Reservation. These watercourses include Lake Coeur d'Alene. The Complaint further seeks a declaratory judgment that these beds, banks, and waters at issue are for the exclusive use, occupancy, and enjoyment of the Tribe. The Complaint also asks the court to declare invalid all Idaho statutes and ordinances which regulate or affect in any way the disputed lands and waters, and to declare invalid the water right set forth in Idaho Code § 67-4304.¹ And,

¹ Idaho Code § 67-4304 (1989) reads, in part, as follows: The governor is hereby authorized and directed to appropriate in trust for the people of the state of Idaho all the unappropriated water of Priest, Pend

lastly, the Complaint seeks an injunction enjoining the State and its agencies and officials from taking any action to regulate or in any way affect the Tribe's right to these lands and waters.

Rather than answer the Complaint, the State, and the officials and agencies of the State, filed a Motion to Dismiss on November 13, 1991, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. The motion is brought on the grounds that this action is barred by the jurisdictional limitations imposed on the federal judiciary by the Eleventh Amendment to the United States Constitution. The motion is also made on the grounds that the Complaint fails to state a claim upon which relief may be granted.

The Tribe responded to the Motion to Dismiss on February 21, 1992. The State then filed its reply brief on March 6, 1992. A hearing on this motion was held on Wednesday, June 17, 1992, in Coeur d'Alene, Idaho. This motion is now ripe for decision.

d'Oreille and Coeur d'Alene Lakes or so much thereof as may be necessary to preserve said lakes in their present condition. The preservation of said water in said lakes for scenic beauty, health, recreation, transportation and commercial purposes necessary and desirable for all the inhabitants of the state is hereby declared to be a beneficial use of such water.

II. ANALYSIS

A. Introduction

The Tribe seeks to have all beds, banks, and waters of all navigable waters within the 1873 borders of the reservation returned to their exclusive occupancy and use. The court is acutely aware of the significant interests at stake for the parties on both sides of this dispute. Consequently, the court has conducted a very careful and thorough analysis of the memoranda filed by the parties and the cases cited therein, and the affidavits, and exhibits submitted in connection with the memoranda, as well as the arguments made by counsel at the hearing. Upon completion of this analysis, the court finds that the State's position is correct. The claims brought by the Tribe are barred by the Eleventh Amendment, and the Tribe has failed to state a claim upon which relief may be granted. Based on the discussion to follow, the Motion to Dismiss will be granted.

B. Motion to Dismiss as Relates to the State of Idaho

The court has reviewed many cases dealing with state immunity under the Eleventh Amendment with respect to suits in federal court by Indian tribes against states. In terms of the motion now at issue, the court finds the recent Supreme Court case of *Blatchford v. Native Village of Noatak*, ___ U.S. ___, 111 S. Ct. 2578 (1991), to be particularly instructive. In this case, the Supreme Court reversed the Ninth Circuit's decision in *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990).

In *Hoffman*, native village governments, which the Ninth Circuit accepted as falling within the definition of "tribes," sued the State of Alaska, the Alaska Department of Community and Regional Affairs, and the Commissioner of that department. The plaintiffs sought an order directing the state to pay over their pro rata share of revenue sharing monies appropriated by the state legislature. The plaintiffs further sought an injunction prohibiting the Commissioner from diluting the plaintiffs' share of those monies by expanding the class of eligible recipients. The plaintiffs further alleged that the actions of the state, its agencies and officials, violated the constitutional rights of the members of the tribes and villages, in violation of 42 U.S.C. § 1983.

The district court dismissed the case, holding that it lacked subject matter jurisdiction because the plaintiffs' suit was barred by the Eleventh Amendment or because, in the alternative, the case did not arise under the Constitution, laws, or treaties of the United States. *Native Village of Noatak v. Hoffman*, 896 F.2d at 1159-60. The plaintiffs then appealed to the Ninth Circuit.

The Ninth Circuit held that Eleventh Amendment immunity does not apply when a state is sued by an Indian tribe. *Id.* at 1165. The Ninth Circuit also held that although 28 U.S.C. § 1362² did not expressly abrogate

² Title 28 U.S.C. § 1362 provides that, "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C.S. § 1362 (Law. Co-op. 1988).

state immunity from suit by Indian tribes, an express abrogation was unnecessary because of its decision that the Eleventh Amendment does not apply when states are sued by tribes. *Id.* at 1164-65.

In *Blatchford*, the Supreme Court reversed the Ninth Circuit. The Supreme Court held that the Eleventh Amendment³ bars suits by Indian tribes against states without their consent.

Despite the narrowness of its terms, since *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L.Ed. 842 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . . and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Village of Noatak, 111 S.Ct. at 2581 (citations omitted).

The tribes in *Blatchford* first argued that sovereign immunity only restricts suits by *individuals* against sovereigns, not by *sovereigns* (i.e. Indian tribes) against sovereigns. The Supreme Court noted that this same

³ The Eleventh Amendment reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S.C.S. Constitution, Amendment 11 (Law. Co-op. 1984).

argument was rejected in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).⁴

The tribes next argued that the states had waived their immunity from suits by Indian tribes when the states adopted the Constitution. This position was adopted by the Ninth Circuit, and led to the appeal to the Supreme Court. The Supreme Court held that:

Just as in *Monaco* with regard to foreign sovereigns . . . there is no compelling evidence that the Founders thought such a surrender inherent in the constitutional compact. We have hitherto found a surrender of immunity against particular litigants in only two contexts: suits by sister States . . . and suits by the United States.

Blatchford v. Native Village of Noatak, 111 S.Ct. at 2582 (citations and footnote omitted). In making their argument, the tribes asserted that Indian tribes are more like states than foreign sovereigns, and they should therefore be allowed to sue states just as one state may sue another in federal court. The Supreme Court also rejected this assertion.

The relevant difference between States and foreign sovereigns, however, is not domesticity, but the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with

⁴ In *Monaco*, the Supreme Court held that states are immune from suit in federal court by foreign sovereigns. *Principality of Monaco v. Mississippi*, 292 U.S. at 330.

either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity from suits by States . . . as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Id. at 2582-83 (citation omitted).

In addition, the Supreme Court held that 28 U.S.C. § 1362 does not abrogate the states' Eleventh Amendment Immunity from suit by Indian tribes. The Court noted the test for congressional abrogation set forth in *Dellmuth v. Muth*, 491 U.S. 223 (1989). The test requires that the intent of Congress to abrogate Eleventh Amendment immunity must be "unmistakenly clear in the language of the statute." *Id.* at 228. The Court ruled that 28 U.S.C. § 1362 did not meet this standard. *Blatchford v. Native Village of Noatak*, 111 S.Ct. at 2586.

The recent *Blatchford* decision clearly enunciates the Supreme Court's fundamental views about a state's Eleventh Amendment immunity from suit by Indian tribes. The Court expressly held that suits by tribes against states are barred by the Eleventh Amendment. The Court also expressly held that suits against states for money damages are barred. In addition, the Supreme Court in a previous decision made it clear that the Eleventh Amendment bars suits against states in *both law and equity*. "And, as when the *State itself* is named as the defendant, a suit against state officials that is in fact a suit against a State is barred *regardless of whether it seeks*

damages or injunctive relief." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984) (citation omitted). The Court made this quite clear in *Cory v. White*, 457 U.S. 85 (1982):

Edelman did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. . . . Thus, *the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity*. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself.

Id. at 90-91 (footnote omitted) (emphasis added).

Therefore, based on the preceding analysis, the court finds that this action is completely barred as against the State of Idaho itself, as well as its agencies, by operation of the Eleventh Amendment.

C. Motion to Dismiss as Relates to Individual State Officials

With respect to the individual defendants acting in their official capacity, the court first notes *Pennhurst State School & Hosp. v. Halderman*, *supra*, in which the Supreme Court declared:

The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." . . . Thus, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign *if the decree would operate against the latter.*" . . . And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred *regardless of whether it seeks damages or injunctive relief.*

Id. 465 U.S. at 101-02 (citations omitted) (emphasis added).

There is an exception to this general rule where a suit challenges the constitutionality of a state official's action in attempting to enforce a statute which is alleged to violate federal law. *See Ex parte Young*, 209 U.S. 123 (1908). Under such circumstances, a federal court may issue an injunction to prohibit a state official from violating federal law. Yet, the Supreme Court itself characterizes this as a *narrow* exception, which has not been expansively interpreted. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. at 102. In addition, such an injunction may govern an official's *future* conduct, but may not attempt to award retroactive relief. *Id.* at 102-03.

In *Green v. Mansour*, 474 U.S. 64 (1985), a class action was brought in federal court against the director of the Michigan Department of Social Services, but the State of Michigan was not named as a defendant. The plaintiffs sought a declaratory judgment from the court. The Supreme Court held that declaratory relief is *impermissible* where such relief would

have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment. The teachings of Huffman, Samuels, and Wycoff are that a declaratory judgment is not available when the result would be a partial "end run" around our decision in Edelman v. Jordan

Green v. Mansour, 474 U.S. at 73 (citation omitted) (emphasis added).

Under the circumstances of the case at hand, the court concludes that the declaratory relief sought by the Tribe *would* have the same effect as an award of damages or restitution by the court, which is not allowed under the Eleventh Amendment. In addition, by also suing the state officials to quiet title, and for declaratory judgment, the Tribe is essentially attempting to execute an "end run" around the rule in *Edelman v. Jordan*, 415 U.S. 651 (1974), which prohibits suits in federal court against state officials for money damages or the equivalent, under the Eleventh Amendment. It should also be noted that in *Edelman*, the Supreme Court stated that "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 663-64 (quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945)).

Thus, based on the preceding analysis, the claims for declaratory judgment and to quiet title against the individual state officials are also barred by the Eleventh Amendment. These causes of action do not fall within the

narrow exception set forth in *Ex parte Young* and its progeny. This conclusion is based on the nature of the relief sought and on the court's finding (set forth below) that because the State has been in rightful possession of the beds, banks, and waters at issue since its admission to the Union, these state officials are not violating any federal law.

The remaining question is whether the prayer for an injunction against the individual defendants prevents the court from granting the Motion to Dismiss. For this prayer to survive, it must meet the criteria first established in *Ex Parte Young*. In order for the court to be able to issue an injunction against the individual defendants, to prevent them from regulating or taking any action contrary to the Tribe's claimed right of exclusive use and possession of the disputed lands and waters, notwithstanding the jurisdictional limitations of the Eleventh Amendment, the Tribe must show that the injunction is necessary to prevent the state officials from continuing to violate rights secured and protected by federal law.

The court could enjoin the individual defendants if it were to find that the State is not the rightful owner of the disputed lands and waters. Yet, the claims asserted by the Tribe are without foundation, and similar claims have often been rejected by federal courts. It has long been recognized that the ownership of land under navigable waters is an incident of sovereignty. See *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 409-411 (1842). It is also well established that the federal government held such lands in trust for future states, to be granted to new states as they entered the Union, so that the new states would

assume sovereignty on an "equal footing" with the established states. See *State of Montana v. United States*, 450 U.S. 544, 551 (1981).

The equal footing doctrine is deeply rooted in history, and the proper application of the doctrine requires an understanding of its origins. Under English common law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people. . . . When the 13 Colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown. . . . Because all subsequently admitted States enter the Union on an "equal footing" with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union.

Utah Div. of State Lands v. United States, 482 U.S. 193, 195-96 (1987) (citations omitted).

A state's power over the beds of navigable waters is subject only to the right of the federal government to ensure that the waters remain open to interstate commerce. *State of Montana v. United States*, 450 U.S. at 551; see also *United States v. State of Oregon*, 295 U.S. 1, 14 (1935). It is also recognized that prior to the admission of a state into the Union, Congress may have at times conveyed

lands under its navigable waters for certain limited purposes, "[b]ut because control over the property underlying navigable waters is so strongly identified with the sovereign power of government . . . it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency.' " *State of Montana v. United States*, 450 U.S. at 552 (citation omitted).

In *Montana*, the Supreme Court directed that:

A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States . . . and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain" . . . or was rendered "in clear and especial words" . . . or "unless the claim confirmed in terms embraces the land under the waters of the stream"

Id. (citations omitted) (emphasis added).

In *United States v. Holt State Bank*, 270 U.S. 49 (1926), the Supreme Court addressed an Indian tribe's claim to the bed of a navigable lake in Minnesota. The lake was completely within the boundaries of the tribe's reservation, which was created by treaties before Minnesota entered the Union.

In these treaties the United States promised to "set apart and withhold from sale, for the use of" the [Chippewa tribe], a large tract of land, Treaty of Sept. 30, 1854, 10 Stat 1109, and to convey "a sufficient quantity of land for the permanent homes" of the Indians, Treaty of Feb. 22, 1855, 10 Stat 1165. . . . The Court concluded that there was nothing in the treaties "which

even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy . . . of treating such lands as held for the benefit of the future State."

State of Montana v. United States, 450 U.S. at 552-53 (quoting *United States v. Holt State Bank*, 270 U.S. at 58-59).

The Supreme Court reached the same conclusion on different facts in *Montana*. In *Montana*, the Crow Tribe of Montana, by tribal resolution, prohibited hunting and fishing within the borders of their reservation by anyone who was not a member of the tribe. The State of Montana continued to assert its right to regulate hunting and fishing by non-Indians within the reservation. The United States intervened in the suit on its own behalf and as fiduciary for the tribe. The United States sought,

(1) a declaratory judgment quieting title to the bed of the Big Horn River in the United States as trustee for the Tribe, (2) a declaratory judgment establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and (3) an injunction requiring Montana to secure the permission of the Tribe before issuing hunting or fishing licenses for use within the reservation.

State of Montana v. United States, 450 U.S. at 549.

The district court denied all claims. In doing so, the district court relied on the presumption that the federal government did not intend to convey title to navigable waters and the lands beneath them. In applying that presumption to the facts of that case, the district court concluded that the language of the treaties and other

factual circumstances were insufficient to overcome the presumption. *Id.*

The Ninth Circuit reversed the district court on the grounds that the 1868 treaty caused the beds and banks of the river to be held by the United States in trust for the tribe. The Supreme Court then reversed the Ninth Circuit decision. The Supreme Court first noted that the treaty of 1868 described the reservation land in detail:

"[C]ommencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning. . . ." Second Treaty of Fort Laramie, May 7, 1868, Art II, 15 Stat 650.

Id. at 553, n.4. The treaty further specified that the reservation land was set aside for the absolute and undisturbed use and occupation of the tribe. *Id.* at 553.

Although the treaties which created the Crow reservation described the reservation land in detail, including a boundary which extended to the middle of the channel of a section of the Yellowstone River, the Supreme Court in *Montana* held that all the treaties did was reserve the designated land in a general way to ensure the continued occupation of the Indians in what remained of their ancestral territory. *Id.* at 554. Thus, the Supreme Court

concluded that the treaties of 1851 and 1868 which created the Crow reservation did not have language sufficient to overcome the strong presumption against conveyance of the beds and banks of navigable waters within the reservation.

The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance [T]he United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed. Therefore, such phrases . . . as "absolute and undisturbed use and occupation" and "no persons[] except those herein designated . . . shall ever be permitted," whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries. . . .

For these reasons, we conclude that title to the bed of the Big Horn River passed to the State of Montana upon its admission into the Union

Id. at 554-56 (citations omitted).

In the case at hand, the Tribe claims that because the Executive Order executed on November 8, 1873, described part of the boundary of the reservation as extending to the center of the channel of the Spokane River, the Tribe is therefore entitled to exclusive possession and use of all the lands underneath, as well as the

banks and beds of *all* navigable waters within the boundaries of the reservation. This assertion is indefensible and is contrary both to the clear holding in *Montana*, and the *strong presumption* in favor of these lands being conveyed to the State of Idaho upon its entry into the Union.

The 1873 executive agreement with the Coeur d'Alene Tribe and the formal agreement ratified in 1891 had many similarities to the 1868 treaty with the Crow tribe at issue in the *Montana* case: (1) the agreements with the Coeur d'Alene Tribe also described the reservation lands in detail; (2) one boundary of the reservation was set in the middle of a river (the Spokane River); (3) the reservation lands were set aside in a general way, to be held forever as Indian lands, never to be sold, opened to white settlement, or otherwise disposed of without the consent of the Tribe; and (4) there was no express conveyance or other reference to the beds or banks of navigable waters which would overcome the strong presumption against such conveyance.

The court is bound to interpret the 1873 agreement and the formal agreement ratified in 1891, which extended one boundary of the reservation to the center of a portion of the Spokane River, the same way that the Supreme Court interpreted the treaty with the Crow tribe in the *Montana* case, which had similar provisions. Therefore, because the agreements with the Coeur d'Alene Tribe made no express conveyance of the beds and banks of navigable waters within the reservation, or any other references which could be construed as having done so, the court finds that there is nothing in the agreements which overcomes the strong presumption that these lands were held in trust by the United States and conveyed to

the State of Idaho upon its admission to the Union on an "equal footing" with the other states.⁵

Therefore, the court finds that the State of Idaho has been in rightful possession of all of the lands and waters at issue in this case since it entered the Union in 1890. Consequently, the Tribe is not entitled to an injunction against the individual defendants in either their official or individual capacities.

D. Title 42 U.S.C. § 1983 Claim

Based on the reasons stated above, the plaintiffs' Title 42 U.S.C. § 1983⁶ claim also fails. First, the Section 1983

⁵ The Tribe's claim to the banks and beds of the navigable waters within the reservation is based almost exclusively on the fact that one portion of the original reservation boundary extended to the middle of the Spokane River. As noted above, the court finds that this claim is contrary to long-established and well-recognized law. In addition, the court notes that this claim is especially weak because an area of the reservation, including this section of the Spokane River, was ceded by the Tribe to the United States by an agreement executed in 1889.

The court further notes that the agreements with the Tribe were not formally ratified by Congress until March 3, 1891, eight months *after* Idaho was admitted to the Union. It is well established that Congress cannot convey a state's submerged lands to other parties after statehood. See *Shively v. Bowlby*, 152 U.S. 1, 27 (1894).

⁶ Section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

action against the State of Idaho is barred by the Eleventh Amendment. In *Quern v. Jordan*, 440 U.S. 332 (1979), the Supreme Court held that Section 1983 did not overcome the sovereign immunity guaranteed to the states by the Eleventh Amendment. *Id.* at 342-43. This decision was reaffirmed in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), where the Court declared:

Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity . . . or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity. That Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance in that respect was made clear in our decision in *Quern*.

Id. at 66.

Second, the court finds that the Tribe may not bring a Section 1983 action because it is not a "citizen of the United States or other person" for purposes of Section 1983. Therefore, the remaining issue is whether the Section 1983 claim brought by the individual plaintiffs

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (Law. Co-op. 1990).

against the state officials can survive the Motion to Dismiss.

The court has determined that the State of Idaho is and always has been in rightful possession of the beds, banks, and waters of all of the navigable watercourses at issue in this case. Because of this conclusion, the Section 1983 claim against the individual defendants, both in their official and individual capacity, is barred because the plaintiffs are not being deprived of any rights, privileges, or immunities secured by the Constitution and laws of the United States.

Thus, for the foregoing reasons, the court concludes that this entire action should be dismissed.

III. ORDER

Based on the foregoing, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the Motion to Dismiss filed on November 13, 1991, should be, and is hereby, GRANTED. All claims brought by the plaintiffs in this action are hereby DISMISSED.

DATED this 20th day of July, 1992.

/s/ Harold L. Ryan
HAROLD L. RYAN
UNITED STATES
DISTRICT JUDGE

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No. 94-1474

Supreme Court, U. S.

FILED

APR 5 1995

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1994

STATE OF IDAHO; PHIL BATT, GOVERNOR; PETE
CENARRUSA, SECRETARY OF STATE; ALAN G. LANCE,
ATTORNEY GENERAL; J.D. WILLIAMS, CONTROLLER;
ANNE FOX, SUPERINTENDENT OF PUBLIC INSTRUCTION;
KEITH HIGGINSON, DIRECTOR, DEPT. OF WATER
RESOURCES, each individually and in his official capacity;
IDAHO STATE BOARD OF LAND COMMISSIONERS; and
IDAHO STATE DEPARTMENT OF WATER RESOURCES,

v.

Petitioners,

COEUR d'ALENE TRIBE, in its own right and as the
beneficially interested party subject to the trusteeship
of the UNITED STATES OF AMERICA; ERNEST L.
STENSGAR, LAWRENCE ARIPIA, MARGARET JOSE,
DOMNICK CURLEY, AL GARRICK, NORMA PEONE and
HENRY SIJOHN, individually, in their official capacity and
on behalf of all enrolled members of COEUR D'ALENE TRIBE,

Respondents.

IN THE MATTER OF THE OWNERSHIP OF THE
BEDS AND BANKS AND ALL WATERS OF ALL
NAVIGABLE WATERCOURSES WITHIN THE 1873
COEUR d'ALENE RESERVATION BOUNDARY.

**Brief In Opposition To Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit**

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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PETITIONER'S QUESTIONS PRESENTED

1. The Eleventh Amendment bars federal courts from hearing quiet title actions brought by Indian tribes against a State to adjudicate title to, and gain possession of, waters and submerged lands held by the State under the equal footing doctrine of the United States Constitution. The issue presented by this case is whether a federal court may nonetheless hear an action against state officers for injunctive and declaratory relief when such relief requires adjudication of the State's title and will deprive the State of all practical benefits of ownership of the disputed waters and submerged lands.

2. The President, absent an express delegation of Congress' exclusive authority over public lands, cannot convey title of uplands to Indian tribes. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). The issue presented in this case is whether the President, acting without express congressional authority, can nonetheless convey title of the beds and banks of navigable waters to an Indian tribe, thereby defeating a State's entitlement to such lands under the equal footing doctrine of the United States Constitution.

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No. 94-1474

In The

Supreme Court of the United States

October Term, 1994

STATE OF IDAHO; PHIL BATT, GOVERNOR; PETE CENARRUSA, SECRETARY OF STATE; ALAN G. LANCE, ATTORNEY GENERAL; J.D. WILLIAMS, CONTROLLER; ANNE FOX, SUPERINTENDENT OF PUBLIC INSTRUCTION; KEITH HIGGINSON, DIRECTOR, DEPT. OF WATER RESOURCES, each individually and in his official capacity; IDAHO STATE BOARD OF LAND COMMISSIONERS; and IDAHO STATE DEPARTMENT OF WATER RESOURCES,

v.

Petitioners,

COEUR d'ALENE TRIBE, in its own right and as the beneficially interested party subject to the trusteeship of the UNITED STATES OF AMERICA; ERNEST L. STENSGAR, LAWRENCE ARIPIA, MARGARET JOSE, DOMNICK CURLEY, AL GARRICK, NORMA PEONE and HENRY SIJOHN, individually, in their official capacity and on behalf of all enrolled members of COEUR D'ALENE TRIBE,

Respondents.

IN THE MATTER OF THE OWNERSHIP OF THE BEDS AND BANKS AND ALL WATERS OF ALL NAVIGABLE WATERCOURSES WITHIN THE 1873 COEUR d'ALENE RESERVATION BOUNDARY.

Brief In Opposition To Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

The Respondents respectfully request the Court deny the petition for writ of certiorari seeking review of the Court of Appeals for the Ninth Circuit's opinion in this case. 42 F.3d 1244.

ADDITIONAL CONSTITUTIONAL PROVISION INVOLVED

In addition to the Property Clause and the Eleventh Amendment to the United States Constitution set out by the Petitioner, the following Idaho Constitutional provision is applicable:

[A]nd the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; . . .

Idaho Constitution, Article XXI § 19.

STATEMENT OF THE CASE

1. Record and Facts

This is an action by a federally recognized Indian Tribe and its duly elected leaders against a State, state agencies and state officers. At issue is ownership of the

beds and banks and waters of various navigable watercourses. The relief requested below was to quiet title and for declaratory and injunctive relief.

The State of Idaho and various state agencies and officials were Defendants below and are Petitioners before the Court. The Coeur d'Alene Tribe and tribal officers were Plaintiffs below, Respondents here and are referred to collectively as "Tribe." The Tribe brings this action "as the beneficially interested party subject to the trusteeship of the United States." This is important because of the interrelationship between this case and *United States v. Idaho*, No. 94-0328 (U.S.D. Ct. ID), App. at 22-61, discussed below.¹

This case is before the Court on the skimpiest of records. There is only a Complaint, App. at 3-14 and a FRCP 12(b) Motion to Dismiss, App. at 15-17. There is no Answer, no affidavit, no discovery and no testimony.

In its Statement of the Case the Petitioners repeatedly and improperly refer to factual and other matters that are not part of the record of this case and therefore not properly before the Court. Petition at 3-7.

2. Proceedings Below

The proceedings in the District Court were heard on a FRCP 12(b) Motion to Dismiss App. at 15-18. The

¹ Various pleadings from *United States v. Idaho* were filed in this case as an appendix to a document titled Notice of Filings which was filed in the Court of Appeals. App. 19-61.

decisions of the District Court and the Court of Appeals are set out in the Petitioners' Appendix at 1-28 and 29-49.

Petitioners' Eleventh Amendment Issue. The District Court held that the Eleventh Amendment precluded that court from considering the claim to quiet title and for other relief against the State and state agencies. The District Court, without factual record, went to the merits on the 12(b) motion, found no violation of federal law, and dismissed the Tribe's case. *Coeur d'Alene Tribe of Idaho v. State of Idaho*, CV-91-437-HLR (U.S.D.Ct. Idaho), Petitioner's App. 29-49.

The Court of Appeals agreed the Eleventh Amendment precluded the District Court from considering the claims to quiet title and for other relief against the State and state agencies. As to the officials, the Court of Appeals applied the *Ex Parte Young*, 209 U.S. 123 (1908) analysis and the three-part test of *State of Florida, Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). The Court of Appeals held the requested relief of enjoining state officials from interfering with tribal interests in the property was not equivalent to payment of funds from the state treasury and therefore not barred by the Eleventh Amendment. The Court of Appeals carefully refrained from exercising jurisdiction to quiet or otherwise adjudicate Petitioners' title. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 1-23.

Petitioners' Executive Order Issue – The District Court held, on the 12(b) motion and the minimal record described above, that the 1873 Executive Order was insufficient to overcome the strong presumption that the submerged lands had passed to the State at statehood under the

equal footing doctrine. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 37-47.

The Court of Appeals did not rule on whether the Executive Order was sufficient to convey the submerged lands to the Tribe. Rather, the Court of Appeals ruled only that "it was conceivable that the Tribe could prove facts that would entitle it to the relief sought, . . ." and remanded the case for trial. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 27.

Rulings Below on Issues Outside the Petition. The District Court totally failed to address Count 1 of the Tribe's Complaint regarding aboriginal title claims to the beds, banks and waters and yet dismissed the entire action. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 29-49. The Court of Appeals held this to be error, reversed and remanded for trial to consider the aboriginal title issues and facts. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 28.

3. Relation to *United States v. Idaho*.

Between the time this case was argued to the Court of Appeals and the issuance of its decision, the United States, as trustee for the Tribe, sued the State of Idaho in federal court over the same basic matter at issue in this case.² App. at 22-32.

² The United States' Complaint in *United States v. Idaho* is against the State of Idaho only. The Complaint is not as expansive as the Tribe's Complaint in this case. The United States' Complaint is to quiet title to only a portion of the beds and banks of Lake Coeur d'Alene, while the Tribe's Complaint includes a larger area, as well as water and aboriginal title.

The State of Idaho (Petitioner in this case) answered, admitted jurisdiction, and *counterclaimed*. App. at 33-44. The counterclaim was more expansive than the U.S.'s Complaint.³ App. at 41.

The Tribe moved to intervene (App. at 50-51) and filed a proposed Complaint containing the same issue raised in this case. App. at 52-61. That Motion is still pending.

REASONS FOR DENYING THE WRIT

The granting of certiorari is reserved for "special and important cases." S.Ct. Rule 10.1. In an era when petitions for certiorari outnumber those that can be granted by over 30 to 1, the granting of Writs of Certiorari should be reserved for those cases which are fully developed, will have a broad impact, and in which resolution of the Questions Presented will make a difference in the ultimate outcome. This is not such a case.

This section is broken down into seven different reasons why the certiorari should be denied. In a general way, those reasons are: 1) the Eleventh Amendment Question Presented is undercut by the Petitioner's own actions in a related case (filing a counterclaim in the

³ The Counterclaim was by the State of Idaho itself. It asks the federal court for a judgment "quieting its title to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River within the Coeur d'Alene Reservation." App. at 41 § 6.6(1). This places at issue ownership of the entire lake because if the entire lake is owned by the United States in trust for the Tribe it is "within the Coeur d'Alene Reservation."

federal case of *United States v. Idaho*, No. 94-0328 (U.S.D. Ct. ID)), which has resulted in the Petitioner voluntarily submitting itself to the jurisdiction of the federal court against a party in privity with the Tribe to resolve the same basic issues of this case, 2) there are unique questions of law and unresolved factual matters that complicate the two Questions Presented and narrow their impact to the unique factual and legal issues in this case, and 3) there are no conflicts with decisions of this Court or the various Circuits.

These reasons are more fully developed in the following seven subsections.

1. The Eleventh Amendment Question Presented should not be considered because Petitioner State of Idaho has voluntarily subjected itself to federal court jurisdiction concerning this subject matter by filing a counterclaim in *United States v. Idaho* against the United States which is in privity with the Tribe as its trustee.

The Question Presented regarding the Eleventh Amendment concerns federal court jurisdiction over an action against state officials by an Indian tribe seeking to halt interference with the tribe's property. This question cannot be decided in a vacuum.

The impact of the related case of *United States v. Idaho*, 94-0328 (D. Idaho), App. at 22-61, must be considered. Of particular importance is the Petitioner's (State) *voluntary* submission to federal court jurisdiction by filing its counterclaim against the Tribe's trustee regarding the dominant issue of both cases. App. at 41 § 6.6(1).

Indian tribes and the United States are in close privity as a result of their trust relationship. A judgment binding the United States regarding Indian rights also binds the tribe even when the tribe is not a party to the action. *Arizona v. California*, 460 U.S. 605, 614 (1983); *Nevada v. United States*, 463 U.S. 110, 135 (1983).

Because of this privity, a state should not be invoking the jurisdiction of the federal court against the trustee and then seek the protection of the Eleventh Amendment in a simultaneous action by the beneficiary when the two suits concern essentially the same subject matter.

The Eleventh Amendment Question Presented should not be considered because it will not make a difference in the ultimate outcome of the merits of the case due to the Petitioner's counterclaim in *United States v. Idaho*.

2. **The Eleventh Amendment Question Presented cannot be reached because Petitioner State of Idaho has defined its own sovereignty in a limited way so that a quiet title action presents no claim against the Petitioner's sovereignty.⁴**

The rationale behind the judicial expansion of the Eleventh Amendment doctrine is that the judicial

⁴ This argument regarding state officials is identical to the Cross-Petition's argument regarding the State itself. The state official argument is presented in this Response because it simply forms a different basis under which the Court of Appeals could have reached the same conclusion without modifying its judgment. *Chevron v. NRDC*, 467 U.S. 837, 842 n. 7 (1984). The argument as to the State is set out as a Cross Petition because it would alter the judgment if decided in the Tribe's favor. *Federal Energy Administration v. Algonquin SNG*, 426 U.S. 548, 560 n. 11 (1976).

authority of Article III courts is limited by the breadth of a state's sovereignty.

[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the plan of convention.

Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991).

If an action directly impacts the *sovereignty* of a state, the Eleventh Amendment bars federal court jurisdiction. But if the *sovereignty* of a state is not impacted, the rationale explained in *Blatchford* does not come into play. The ability of a sovereign to define the scope of its own sovereignty is the most fundamental function of that power.

The Petitioner has defined and limited its sovereignty in a unique way by declaring that quiet title actions regarding property in which the state claims an interest present no claim against the state's sovereignty.

A suit to quiet title to land allegedly owned by appellants and to which the Board of Education of the State of Idaho allegedly assert a claim is not a claim against the Board of Education, or the State, to which it can interpose sovereign immunity as a defense. (citations omitted)

The appellants by the proceeding [to quiet title] are asserting no claim against the sovereignty, but are attempting to retain what they allegedly own.

Hence the contention that such [quiet title] proceedings deprives the State, its officials or boards, of sovereign rights of immunity, is without merit.

Lyon v. State, 283 P.2d 1105, 1106 (Idaho 1955).

This argument is discussed in greater detail in the Cross-Petition. Since a quiet title action presents *no claim against the sovereignty* of the state, there is no basis for invoking the Eleventh Amendment to shield state officials from federal court suits regarding the property. The limitations on the Petitioner's sovereignty prevents the Eleventh Amendment Question Presented from ever being reached.

3. There is no conflict between the Court of Appeals' Eleventh Amendment decision and prior decisions of this Court or the other Circuits.

The Court of Appeals meticulously followed all of the prior Eleventh Amendment decisions of this Court, especially *Ex Parte Young*, 209 U.S. 123 (1908) and its progeny, *State of Florida v. Treasure Salvors*, 458 U.S. 670 (1982) and *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). Although the Tribe had sought broad relief against a broad range of Petitioners, the Court of Appeals was careful to narrow the relief (prospective relief only) against a narrow group of Petitioners (officials only). *Coeur d'Alene Tribe v. Idaho*, Petitioner's

App. at 4-23. The Court of Appeals was especially careful to limit the relief so there would be no federal court adjudication of Petitioner's claimed title to the property. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 22-23.

It would be unnecessarily repetitive, and a disservice to the Court of Appeals' careful analysis, to attempt to restate it here. After limiting the relief available because of the dictates of this Court's various Eleventh Amendment decisions, the Court of Appeals recognized the unique role of the federal judiciary in our system of federalism concerning tribal/state property disputes when it stated:

We will not refuse to enforce the federal rights of Indian tribes against action by state officials merely because we cannot afford them complete relief.

Coeur d'Alene Tribe v. Idaho, Petitioner's App. at 23.

There is no conflict between the Court of Appeals' decision and the decisions of this Court.

Nor is there any conflict between the Court of Appeals' decision and decisions of the other Circuits. An obvious distinction is that none of the cases cited by the Petitioner involves a dispute with Indian tribes. *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989), *Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665 (7th Cir. 1992), *Toledo, Peoria & Western R.R. Co. v. Illinois Dep't. of Transportation*, 744 F.2d 1296, 1299 (7th Cir. 1984), *John G. & Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667 (5th Cir. 1994), *Harrison v. Hickel*, 6 F.3d 1347, 1348 (9th Cir. 1993). *Harrison* involved a suit by an Alaska Native, not a tribe. It was

also distinguished by the Court of Appeals on other grounds. As the Court of Appeals noted "states cannot provide a remedy for the taking of Indian lands that are held pursuant to federal law." *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 17 n.8.

The Court of Appeals carefully discussed why *Toledo, Peoria & Western* and *Harrison* were not applicable. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 17. The Court of Appeals noted *Fitzgerald* was inapplicable for the same reason as *Toledo, Peoria & Western*, (no claimed violation of federal law). *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 18.

The Court of Appeals was careful to follow this Court's ruling in *Treasure Salvors* and the Fifth Circuit's handling of that case on remand. *State of Florida, Dept. of State v. Treasure Salvors*, 689 F.2d 1254, 1256 (5th Cir. 1982), (*Treasure Salvors II*). Petitioner's App. at 18-23.

To the extent that *Fitzgerald* or the Fifth Circuit's decision in *Mauro* might be read differently, the Court of Appeals properly relied on the Fifth Circuit's handling of *Treasure Salvors II* on remand from this Court. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 18-23.

There is no conflict between the Court of Appeals' decision and the other Circuits. To the extent any other Circuit decision may be read in conflict, this is not the case to resolve that conflict because of the unique, complicating factors discussed herein.

4. The Eleventh Amendment Question Presented is not an important, unsettled question of federal law, especially in light of the unique limitations resulting from the Petitioner's Counterclaim in *United States v. Idaho* and definition of its own sovereignty.

In recent years this Court has issued numerous Eleventh Amendment decisions: *Employees v. Missouri Department of Public Health*, 411 U.S. 279 (1973), *Edelman v. Jordan*, 415 U.S. 651 (1974), *Quern v. Jordan*, 44 U.S. 332 (1979), *State of Florida v. Treasure Salvors*, 458 U.S. 670 (1982), *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), *Atascadero State Hospital v. Scandon*, 473 U.S. 234 (1985), *Kentucky v. Graham*, 44 U.S. 159 (1985), *Welch v. Texas Department of Highways*, 483 U.S. 468 (1987), *Port Authority Trans Hudson Corporation v. Feeney*, 495 U.S. 299 (1990), *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

The Eleventh Amendment protection afforded states, state agencies, and to a lesser extent state officials, can hardly be considered an area of federal law "which has not been, but should be, settled by this Court." S.Ct. Rule 10.1(c). There is already a well developed body of Eleventh Amendment law.

The Eleventh Amendment Question Presented by Petitioner is undercut by the limitation of its own sovereignty that quiet title actions present no claim against the sovereign of the state. *Lyon, Roddy v. State*, 139 P.2d 1005 (1943). The Petitioner's position is likewise undercut by its Counterclaim in *United States v. Idaho* where it voluntarily submitted itself to the jurisdiction of the court

regarding essentially the same issues against the Tribe's trustee.

These reduce the Eleventh Amendment Question Presented to a mere abstract question of academic interest. This is not the sort of case which merits serious consideration for certiorari in this era of limited judicial resources.

5. **The meager factual record and the numerous controlling legal issues previously unconsidered must be more completely developed before consideration of the Executive Order Issue Presented is proper.**

In the Executive Order Question Presented the Petitioner states a clean, academic issue of ownership of submerged lands simultaneously claimed by a state under the equal footing doctrine and an Indian Tribe under an Executive Order. The Petitioner discusses the Executive Order issues as if the Tribe's title to the submerged land rests solely on the Executive Order. Petition at 18-25. The Petitioner fails completely to discuss the various other factual and legal considerations that demonstrate the Tribe's ownership of the beds, banks and waters at issue. At this stage of the proceeding there is nothing clean or academic about the ownership issue.

The record in this case is very sparse. It consists of only a Complaint and a Motion to Dismiss. There is not even a denial by the Petitioner of tribal ownership. App. at 3-8.

The Court of Appeals did not decide the ownership issue. It only remanded the case to the District Court for the proper development of a factual record and to sort

through the various legal issues. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 27-28. It is well settled that in considering FRCP 12(b)(6) motions the allegations of the Complaint are to be taken as true. *United States v. Mississippi*, 380 U.S. 128, 143 (1965).

The Complaint in *Coeur d'Alene Tribe v. Idaho* states:

The Coeur d'Alene Tribe's beneficial interest, subject to the trusteeship of the United States, in the beds, banks and waters at issue herein has never been ceded by the Coeur d'Alene Tribe, or otherwise extinguished or conveyed by the United States or transferred by operation of law out of tribal ownership.

App. at 9-10 § 24.

For the purpose of a FRCP 12(b)(6) motion, this allegation must be taken as true. *United States v. Mississippi*. This alone defeats the Petitioner's argument.

There are also a myriad of unresolved legal issues that have to be resolved before the Petitioner's Executive Order Question Presented can even be considered. These include:

- 1) Petitioner's disclaimer of interest in Indian lands and the relinquishment to Congress of control over such lands, Idaho Constitution, Art. XXI § 19;
- 2) the effect of the pre-statehood, Congressionally initiated, 24 Stat. 44, 1887 Agreement regarding the Coeur d'Alene Reservation between the Coeur d'Alene Tribe and the United States, 26 Stat. 712;
- 3) the effect of pre-statehood Congressional recognition of the Tribe's title to its Reservation

in a statute conditionally granting a railroad right-of-way through the reservation if consented to by the Tribe and upon payment to the Tribe by the railroad, 25 Stat. 160;

4) the relation back of the 1891 (post-statehood) ratification to the 1887 Agreement, 26 Stat. 160, especially in light of the Idaho Constitution's Indian Disclaimer Clause, Art. XXI § 19, and *Northern Pacific v. Wismer*, 246 U.S. 283 (1918) (holding that the effective date of an Indian reservation related back to the date a tribe enters into an agreement with the United States).

5) the Idaho law in effect at both the time of establishment of the Coeur d'Alene Reservation and statehood that the riparian owner (in this case the Tribe), *not the state*, owned the beds and banks of navigable watercourses. *Johnson v. Johnson*, 107 P. 47 (Idaho 1910), *Donovan-Hopka-Ninneman v. Hope Lumber*, 194 F. 643, 648-9 (9th Cir. 1912), *United States v. Ladley*, 4 F. Supp. 580, 582 (D. Idaho 1933).

These complex legal issues were all raised below, but were rendered unnecessary to resolve on appeal when the Court of Appeals remanded the case.

There are also a myriad of facts supporting the allegations of § 24 of the Complaint, App. at 9-10, recognized by the Court of Appeals' in its statement that "[I]t is conceivable that the Tribe could prove facts that would entitle it to the relief sought," *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 27. These facts must be taken as true at the 12(b)(6) motion steps of these proceedings. *United States v. Mississippi*, 380 U.S. 128, 143 (1965).

After the legal issues have been fully developed and the factual issues have been resolved, there may come a day that this case would be appropriate for consideration by this Court. But in its present state of development, this case is not an appropriate candidate for the issuance of a Writ of Certiorari. The Executive Order Question Presented cannot be reached on this record.

6. There is no conflict between the Court of Appeals' Executive Order decision and the prior decisions of this Court.

The thrust of the Executive Order Question Presented is that the Property Clause vests exclusive authority over public lands in Congress and that since there was no Congressional conveyance, the submerged lands passed to the Petitioners under the equal footing doctrine.

Petitioners claim the Court of Appeals' decision is in conflict with *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987) and *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). There are four reasons why there is no such conflict.

The first reason why there is no conflict is the extensive Congressional involvement and recognition of the Coeur d'Alene's title discussed above.

The second reason why there is no conflict is the formal recognition by Congress of the Coeur d'Alene Reservation in the 1887 Agreement. Although this Agreement was not formally ratified until 1891, a year after statehood, the Tribe's title to its reservation was statutorily recognized by Congress in 1888 (2 years prior to

statehood). In the statute conditionally granting a railroad right-of-way through the Coeur d'Alene Reservation Congress stated:

That the right of way is hereby granted, as hereinafter set forth, to the Washington and Idaho Railroad Company, a corporation organized and existing under the laws of the Territory of Washington, for the extension of its railroad through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation. . . .

That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof. . . .

Provided, That the consent of the Indians to said right of way shall be obtained by said railroad company in such manner as the Secretary of the Interior shall prescribe, before any right under this act shall accrue to said company.

25 Stat. 160 (1888) (emphasis added).

The ratification of the 1887 Agreement relates back to the date of the Agreement. See *Northern Pacific Railroad v. Wismer*, 246 U.S. 283 (1918) (holding that the effective date of an Indian reservation relates back to the date a tribe enters an agreement with the United States). In this case such relation back is especially appropriate because of the Petitioner's disclaimer of all interest in Indian lands in Art. XXI § 19 of its Constitution. The railroad right-of-way act is especially critical because it clearly shows that Congress recognized the Tribe held title to the Coeur d'Alene Reservation which could not be taken

without consent and compensation, even for such a public purpose as railroad expansion.

The Petitioner failed to discuss this right-of-way statute in its argument regarding whether there can be a compensable interest in an Indian reservation created by Executive Order. This railroad right-of-way statute totally refutes the Petitioner's argument regarding *Sioux Tribe v. U.S.*, 316 U.S. 317 (1942), Petition at 22-24.

The third reason why there is no conflict is at the time the Coeur d'Alene Reservation was established and at the time of statehood, the Petitioner did not even claim ownership of the bed and banks of navigable watercourses. *Johnson v. Johnson*, 95 P. 499 (Idaho 1908), *Donovan-Hopka-Ninneman v. Hope Lumber*, 194 F. 643 (9th Cir. 1912), *United States v. Ladley*, 4 F. Supp. 580 (D. Idaho 1933).

Under the law of Idaho at the time of statehood, and when the patents were issued to the allottees, the riparian owner upon a stream, both *navigable* and non-navigable, takes title to the bed of the stream. . . .

United States v. Ladley, 4 F. Supp. 580, 582 (D. Idaho 1933) (emphasis added).

At the time of Petitioner's statehood the Tribe was the riparian owner to all of the navigable watercourses at issue. The beds and banks at issue at the time of statehood were completely surrounded by Tribal lands.

Since the Petitioner did not claim ownership of the beds and banks at the time of statehood, and since it disclaimed all interest in Indian lands, the Petitioner has no basis to claim present ownership, let alone to claim

there is a conflict with prior decisions of this Court in which none of the above elements were present.

The fourth reason why there is no conflict is that the Petitioner's argument is based on the assumption that Executive Order Indian Reservations are somehow inferior to Treaty Indian Reservations. This Court, however, has held just the opposite.

We can give but short shrift at this late date to the argument that the reservations of either land or water are invalid because they were originally set apart by the Executive.

Arizona v. California, 373 U.S. 546, 598 (1963). See also *Antoine v. Washington*, 420 U.S. 194, 198, n.6 (1975).

It is the Petitioners' arguments which would create conflicts with prior holdings of this Court. The Court of Appeals' decision in this case creates no conflict.

7. The Petition should be denied because it is not dispositive of the case.

This entire Petition is similar to an interlocutory appeal. Regardless of how the Executive Order Question Presented is decided, the case will ultimately return to the trial court for resolution of other unresolved issues.

The Court of Appeals specifically remanded the aboriginal title issue back to the District Court. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 28. The Petitioner has presented no question concerning aboriginal title in its Petition. As such the aboriginal title issue will return to the District Court regardless of the outcome of this Executive Order Question Presented.

The same is true of the water rights issue raised in both Counts 1 and 2 of the Complaint. App. pp. 3-14.

Finally, there is still the companion case of *United States v. Idaho* at the District Court level.

Judicial economy and limited judicial resources counsel against granting a Petition of such an interlocutory nature.

CONCLUSION

The Eleventh Amendment Question Presented should not be considered because:

1. The Petitioner has voluntarily invoked the jurisdiction of the federal court against the Tribe's trustee concerning essentially the same subject matter;
2. The Petitioner has defined its own sovereignty so that a quiet title action presents no claim against the sovereignty of the state. Consequently, the Eleventh Amendment does not bar the action because the action presents no claim against the Petitioner's sovereignty;
3. There is no conflict with any decisions of the Court or the other Circuits; and
4. The Eleventh Amendment is a well-settled area of federal law.

The Executive Order Question Presented should not be considered because:

1. The factual record is almost non-existent and the legal issues regarding ownership

have not been adequately developed by the courts below.

2. There is no conflict with any decisions of this Court or the other Circuits; and
3. The Question is not dispositive.

It is respectfully requested that the Petition for Writ of Certiorari be denied. This case can then be remanded to the District Court to develop a suitable procedure for considering this case and *United States v. Idaho* on the merits.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COEUR D'ALENE TRIBE OF	)	No. 92-36703
IDAHO, in its own right and as)	
the beneficially interested party	)	D.C. No. CV
subject to the trusteeship of the	)	91-437-HLR
UNITED STATES OF AMERICA;)	
ERNEST L. STENSGAR;	)	ORDER
LAWRENCE ARIPIA; MARGARET	)	(Filed
JOSE'; DOMNICK CURLEY; AL	)	Dec. 29, 1993)
GARRICK; NORMA PEONE;)	
HENRY SIJOHN, individually, in)	
their official capacity and on)	
behalf of all enrolled members of)	
the COEUR D'ALENE TRIBE OF)	
IDAHO,)	
Plaintiffs-Appellants,)	
v.)	
STATE OF IDAHO; CECIL D.)	
ANDRUS, Governor; PETE)	
CENARRUSA, Secretary of State;)	
LARRY ECHOHAWK, Attorney)	
General; J.D. WILLIAMS, Auditor;)	
JERRY EVANS, Superintendent of)	
Public Instruction; KEITH)	
HIGGINSON, Director, Dept. of)	
Water Resources, each individually)	
and in his official capacity;)	
IDAHO STATE BOARD OF LAND)	
COMMISSIONERS; IDAHO STATE)	
DEPARTMENT OF WATER)	
RESOURCES,)	
Defendants-Appellees.)	

App. 2

It is ordered that appellants' motion of February 23, 1993, to augment the excerpts of record is granted.

It is further ordered that this court take judicial notice of the Idaho Organic Act, the Idaho Constitution, the Indian Claims Commission opinion, and the order and transcript from *Coeur d'Alene Tribe v. Gulf, et al.*

Appellant's motion of December 16, 1992, to supplement the record is otherwise denied.

Appellees' motion to strike all portions of the Appellants' Opening Brief referring to the proffered supplemental material will be ruled on after oral argument.

FOR THE COURT

CATHY A. CATTERSON
CLERK OF COURT

/s/ Gwen Baptiste
By: Gwen Baptiste
Deputy Clerk

App. 3

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE)
OWNERSHIP OF THE BEDS AND)
BANKS AND ALL WATERS OF)
ALL NAVIGABLE WATER)
COURSES WITHIN THE 1873)
COEUR D'ALENE RESERVATION)
BOUNDARY.)

COEUR D'ALENE TRIBE OF)
IDAHO, in its own right and as)
the beneficially interested party)
subject to the trusteeship of the)
UNITED STATES OF AMERICA;)
ERNEST L. STENSGAR,)
LAWRENCE ARIPIA, MARGARET)
JOSE', DOMNICK CURLEY, AL)
GARRICK, NORMA PEONE and)
HENRY SIJOHN, individually, in)
their official capacity and on)
behalf of all enrolled members of)
the COEUR D'ALENE TRIBE OF)
IDAHO,)

Plaintiffs,)

App. 4

vs.	)	CASE NO.
STATE OF IDAHO; CECIL D.	)	CIV 91-0437-
ANDRUS, GOVERNOR; PETE	)	<u>N-HLR</u>
CENARRUSA, SECRETARY OF	)	COMPLAINT
STATE; LARRY ECHOHAWK,	)	(13) QUIET
ATTORNEY GENERAL; J.D.	)	TITLE
WILLIAMS, AUDITOR; JERRY	)	(9) CIVIL
EVANS, SUPERINTENDENT OF	)	RIGHTS
PUBLIC INSTRUCTION; KEITH)	
HIGGINSON, DIRECTOR, DEPT.)	
OF WATER RESOURCES; each	)	(Filed
individually and in his official	)	Oct. 15, 1991)
capacity; IDAHO STATE BOARD)	
OF LAND COMMISSIONERS; and)	
IDAHO STATE DEPARTMENT OF)	
WATER RESOURCES;)	
Defendants.)	

I. PRELIMINARY STATEMENT

1. This is an action by a recognized Indian tribe and its members regarding ownership and use of various beds and banks of navigable water courses and all waters. The action is based on theories of aboriginal or Indian title and on a specific reservation of title by the United States. The beds and banks at issue are those of all navigable watercourses within the 1873 Coeur d'Alene Reservation boundary. The waters at issue are all waters within the 1873 Coeur d'Alene Reservation boundary. The action seeks to quiet the Coeur d'Alene Tribe of Idaho's title in the beds, banks and waters at issue herein, declare that they are for the exclusive use and occupancy and quiet enjoyment of the Coeur d'Alene Tribe and its

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members and enjoin the defendants from taking any action in violation of those rights.

II. JURISDICTION

2. The Court has jurisdiction over this matter pursuant to 28 USC 1331, 1343(4) and 1362.

III. PARTIES

3. The COEUR D'ALENE TRIBE OF IDAHO is an Indian tribe whose governing body is duly recognized by the Secretary of the Interior. It is the beneficially interested party subject to the trusteeship of the United States of America in certain circumstances.

4. ERNEST L. STENSGAR, LAWRENCE ARIPIA, MARGARET JOSE', DOMNICK CURLEY, AL GARRICK, NORMA PEONE and HENRY SIJOHN are all a) enrolled members of the Coeur d'Alene Tribe of Idaho; b) duly elected members of the Coeur d'Alene Tribal Council, the governing body of the Coeur d'Alene Tribe of Idaho; c) citizens of the United States; and 4) residents of the Coeur d'Alene Indian Reservation in the UNITED STATES OF AMERICA.

5. STATE OF IDAHO is one of the 50 states within whose exterior boundary is located the Coeur d'Alene Indian Reservation and the beds, banks and waters at issue herein.

6. GOVERNOR CECIL D. ANDRUS is the chief executive officer of the STATE OF IDAHO, chairman of the BOARD OF LAND COMMISSIONERS, and pursuant to

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67-4304 is the trustee of a 1,000,000 acre foot water right unlawfully issued to him in Lake Coeur d'Alene.

7. PETE CENARRUSA is the SECRETARY OF STATE of the State of Idaho and as such is a member of the State Board of Land Commissioners.

8. LARRY ECHOHAWK is the ATTORNEY GENERAL of the State of Idaho and as such is a member of the State Board of Land Commissioners.

9. JERRY EVANS is the SUPERINTENDENT OF PUBLIC INSTRUCTION of the State of Idaho and as such is a member of the State Board of Land Commissioners.

10. J.D. WILLIAMS is the AUDITOR of the State of Idaho and as such is a member of the State Board of Land Commissioners.

11. KEITH HIGGINSON is the Director of the DEPARTMENT OF WATER RESOURCES.

12. STATE BOARD OF LAND COMMISSIONERS is a creation of the Idaho Constitution charged under Idaho law with effectuating its trustee ownership of the beds and banks of navigable bodies of water subject to the STATE OF IDAHO's jurisdiction.

13. DEPARTMENT OF WATER RESOURCES is a creation of the Idaho Constitution charged under Idaho Law with effectuating the ownership and issuance of licenses authorizing the use of waters under the jurisdiction of the STATE OF IDAHO.

14. The UNITED STATES OF AMERICA has an interest in this proceeding solely as trustee for the COEUR

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D'ALENE TRIBE OF IDAHO of the beds, banks and waters at issue herein.

IV. CLASS

15. This action is properly maintained as a class action under FRCP 23, the class consisting of all present and future enrolled members of the COEUR D'ALENE TRIBE OF IDAHO.

V. FACTS

16. The indigenous people currently known as the COEUR D'ALENE TRIBE OF IDAHO exercised exclusive dominion, control and occupancy [sic] the area from the Idaho/Montana line along the St. Joe/Clearwater divide, west to Steptoe Butte in the current State of Washington, north to Antoine Plant's Ferry in the Spokane Valley, then to Lake Pend Orielle, then south along the Idaho/Montana border to the point of beginning. The COEUR D'ALENE TRIBE therefore held aboriginal or Indian title to all lands, beds, banks and waters in this area, entitling them to the right of exclusive use and occupancy thereof. 4 ICC 1.

17. In 1846 the United States of America purchased from Great Britain the Oregon Territory which included this territory. In that purchase agreement, the United States specifically recognized Indian rights and title. 95 Stat. 869.

18. In 1863 the United States Congress established the Territory of Idaho but specifically exempted all Indian territory from the Territory of Idaho. 12 Stat. 808, ch. 117.

19. In 1873 President U.S. Grant established the Coeur d'Alene Reservation by Executive Order as follows:

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory, viz:

Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of the said ridge to the place of beginning.

Executive Mansion, November 8, 1873.

Since a portion of the boundary description was the "... center of the channel of said Spokane River ..." the Executive Order was an explicit withdrawal and reservation of the beds and banks of navigable water courses

and all waters for the exclusive benefit of Coeur d'Alene Tribe.

20. In 1887 an Agreement was entered into between the Coeur d'Alene Tribe and the United States in which the Coeur d'Alene Tribe ceded lands outside the 1873 Reservation. The Agreement further stated this area within the Reservation was to be held for the Coeur d'Alenes and other Indians and used by others only with the consent of the Indians on the Reservation. 26 Stat. 1026 § 19.

21. In 1889 another Agreement was entered into between the Coeur d'Alene Tribe and the United States in which the Coeur d'Alene Tribe agreed to cede an additional territory to the United States but did not cede any of the beds, banks or waters at issue herein. 26 Stat. 1026 § 20.

22. In 1890 the United States Congress admitted the State of Idaho into the United States by enacting the Idaho Admission Bill which accepted, ratified and confirmed that the Idaho Constitution that disclaimed all right and title to lands owned or held by any Indian Tribes. 26 Stat. 215, ch. 656.

23. The Coeur d'Alene Tribe's Indian or aboriginal title to the beds, banks and waters at issue herein has never been ceded by the Coeur d'Alene Tribe, otherwise extinguished by the United States, or transferred by operation of law out of tribal ownership.

24. The Coeur d'Alene Tribe's beneficial interest, subject to the trusteeship of the United States, in the beds, banks and waters at issue herein has never been ceded by the

Coeur d'Alene Tribe, or otherwise extinguished or conveyed by the United States or transferred by operation of law out of tribal ownership.

25. The value of the beds, banks and waters at issue herein and directly in dispute or controversy exceeds \$10,000.

26. By this Complaint the Coeur d'Alene Tribe of Idaho does not assert any claims of interest adverse to the United State's right of navigable servitude or adverse to any other statutorily created interest the United States has in the beds, banks and waters at issue herein. The Coeur d'Alene Tribe is unaware of any other interest claimed by the United States in the beds, banks and waters at issue herein other than as trustee for the Coeur d'Alene Tribe and this Complaint is served upon the United States solely in that regard.

27. Notwithstanding any other provision of this Complaint to the contrary, the Coeur d'Alene Tribe of Idaho does not assert in this Complaint any claim of interest adverse to that granted by Congress to Fredrick Post in Section 22 of the Act of Congress ratifying the 1887 and 1889 Agreements. 26 Stat. 1026.

28. Defendants' statutes, ordinances, regulations, actions and usages unlawfully purport to regulate, authorize, use or otherwise affect beds and banks and waters at issue herein in violation of the plaintiffs' rights of ownership, including the right of exclusive use and occupancy and the right of quiet enjoyment.

29. The plaintiffs' rights involved in this action are well defined. They are enforceable civil rights of the individual and class plaintiffs secured by the laws of the United States, of which plaintiffs and the class have been unlawfully deprived by defendants under color of state statute, ordinance, regulation, custom and usage in violation of 42 USC 1983.

30. Plaintiffs have no other adequate remedy at law.

31. Plaintiffs are entitled to costs and attorney fees pursuant to 42 USC 1988, IC 12-117 and other theories.

COUNT 1

ABORIGINAL OR INDIAN TITLE TO BEDS, BANKS AND WATERS

32. All other paragraphs are incorporated herein.

33. Plaintiffs are entitled to an order quieting the Coeur d'Alene Tribe's title to the beds and banks of all navigable waters courses and all waters within the 1873 Coeur d'Alene Reservation boundaries.

34. Plaintiffs are entitled to a declaratory judgment pursuant to 28 USC 2201:

- a) declaring that they have the exclusive use and occupancy of all beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries;
- b) declaring invalid all State laws which purport to authorize or regulate any use of the beds and banks of all navigable water

courses and all waters within the 1873 Coeur d'Alene Reservation boundaries; and

- c) declaring invalid the water right in Lake Coeur d'Alene issued pursuant to IC 67-4304.

35. Plaintiffs are entitled to permanent injunction enjoining defendants and their successors in office from taking any actions or enforcing any State statutes, ordinances, regulations, customs or usages which cause the plaintiffs to be deprived of their rights and privileges of exclusive use and occupancy to all beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries.

COUNT 2

RESERVATION OF TITLE TO BEDS, BANKS AND WATERS

36. All other paragraphs are incorporated herein.

37. Plaintiffs are entitled to an order quieting the Coeur d'Alene Tribe's title in its beneficial interests in the beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries subject to the trusteeship of the United States.

38. Plaintiffs are entitled to a declaratory judgment pursuant to 28 USC 2201:

- a) declaring that they have the exclusive use and occupancy of all beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries;

- b) declaring invalid all State laws which purport to authorize or regulate any use of the beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries; and

- c) declaring invalid the water right in Lake Coeur d'Alene issued pursuant to IC 67-4304.

39. Plaintiffs are entitled to a permanent injunction enjoining defendants and their successors in office from taking any actions or enforcing any State statutes, ordinances, regulations, customs or usages which caused the plaintiff to be deprived of their rights and privileges of exclusive use and occupancy to all beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries.

WHEREFORE, the plaintiffs pray that the Court

- 1) Quiet the Coeur d'Alene Tribe of Idaho's aboriginal or Indian title to the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary;
- 2) Quiet the Coeur d'Alene Tribe of Idaho's beneficial interest in title, subject to the trusteeship of the United States to the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary;
- 3) Declare that the plaintiffs are entitled to the exclusive use and occupancy and the right to quiet enjoyment of the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary;
- 4) Declare invalid all Idaho statutes, ordinances, regulations, customs or usages which purport to regulate,

authorize use or affect in any way the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary;

- 5) Declare invalid the water right issued pursuant to IC 67-4304;
- 6) Preliminarily and permanently enjoin defendants from regulating, permitting or taking any action in violation of the plaintiffs' rights of exclusive use and occupancy, quiet enjoyment and other ownership interest in the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary;
- 7) Award plaintiffs their costs and attorney fees;
- 8) Grant such other relief as is deemed appropriate.

DATED this 14th day of October, 1991.

GIVENS AND FUNKE
Attorneys for Plaintiffs

By /s/ Howard Funke
HOWARD FUNKE

By /s/ Raymond C. Givens
RAYMOND C.
GIVENS

LARRY ECHOHAWK
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
STEVEN W. STRACK
Deputy Attorney General
Statehouse, Room 206
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(208) 334-2400

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE)	
OWNERSHIP OF THE BEDS AND)	
BANKS AND ALL WATERS OF)	
ALL NAVIGABLE WATER	)	CASE NO. CIV
COURSES WITHIN THE 1873	)	91-0437-N-HLR
COEUR D'ALENE RESERVATION)	
BOUNDARY)	
<hr/>		
COEUR D'ALENE TRIBE OF	)	MOTION TO
IDAHO, in its own right and as	)	DISMISS
the beneficially interested party)	
subject to the trusteeship of the	)	(13) QUIET
UNITED STATES OF AMERICA;	)	TITLE
ERNEST L. STENSGAR,	)	(9) CIVIL
LAWRENCE ARIPA, MARGARET	)	RIGHTS
JOSE', DOMNICK CURLEY, AL)	
GARRICK, NORMA PEONE and)	
HENRY SIJOHN, individually, in	)	(Filed
in [sic] their official capacity and	)	Nov. 13, 1991)
on behalf of all enrolled members)	
of the COEUR D'ALENE TRIBE)	
OF IDAHO,)	
)	
Plaintiffs,)	

vs.

STATE OF IDAHO; CECIL D.
 ANDRUS, GOVERNOR; PETE
 CENARRUSA, SECRETARY OF
 STATE; LARRY ECHOHAWK,
 ATTORNEY GENERAL; J.D.
 WILLIAMS, AUDITOR; JERRY
 EVANS, SUPERINTENDENT OF
 PUBLIC INSTRUCTION; KEITH
 HIGGINSON, DIRECTOR, DEPT.
 OF WATER RESOURCES; each
 individually and in his official
 capacity; IDAHO STATE BOARD
 OF LAND COMMISSIONERS; and
 IDAHO STATE DEPARTMENT OF
 WATER RESOURCES;

Defendants.

Defendants, State of Idaho; the State Board of Land Commissioners; the Idaho Department of Water Resources; Cecil D. Andrus, Governor; Pete Cenarrusa, Secretary of State; Larry EchoHawk, Attorney General; J.D. Williams, State Auditor; Jerry Evans, Superintendent of Public Instruction; and Keith Higginson, Director of the Idaho Department of Water Resources, by and through their counsel of record, move this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to:

1. Dismiss the Plaintiffs' actions for quiet title, declaratory judgment, and injunctive relief against the State of Idaho; the State Board of Land Commissioners; the Idaho Department of Water Resources; Cecil D. Andrus, Governor; Pete Cenarrusa, Secretary of State; Larry EchoHawk, Attorney General; J.D. Williams,

State Auditor; Jerry Evans, Superintendent of Public Instruction; and Keith Higginson, Director of the Idaho Department of Water Resources, as barred by the jurisdictional limitations of the Eleventh Amendment of the United States Constitution.

2. Dismiss the Plaintiffs' actions for quiet title, declaratory judgment; and injunctive relief against Cecil D. Andrus, Governor; Pete Cenarrusa, Secretary of State; Larry EchoHawk, Attorney General; J.D. Williams, State Auditor; Jerry Evans, Superintendent of Public Instruction; and Keith Higginson, Director of the Idaho Department of Water Resources, for failure to state a claim upon which relief can be granted.
3. Dismiss all civil rights actions brought by the Plaintiffs under 42 U.S.C. § 1983 against the State of Idaho; the State Board of Land Commissioners; the Idaho Department of Water Resources; Cecil D. Andrus, Governor; Pete Cenarrusa, Secretary of State; Larry EchoHawk, Attorney General; J.D. Williams, State Auditor; Jerry Evans, Superintendent of Public Instruction; and Keith Higginson, Director of the Idaho Department of Water Resources, as barred by the jurisdictional limitations of the Eleventh Amendment of the United States Constitution and for failure to state a claim upon which relief can be granted.

Respectfully submitted this 13th day of November, 1991.

LARRY ECHOHAWK
 Attorney General

/s/ Clive J. Strong
 CLIVE J. STRONG
 Deputy Attorney General
 Chief, Natural Resources Division

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/s/ Steven W. Strack
STEVEN W. STRACK
Deputy Attorney General
Attorneys for Defendants

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN THE MATTER OF THE)
OWNERSHIP OF THE BEDS AND)
BANKS AND ALL WATERS OF)
ALL NAVIGABLE WATER)
COURSES WITHIN THE 1873)
COEUR D'ALENE RESERVATION)
BOUNDARY.)

COEUR D'ALENE TRIBE OF)
IDAHO, in its own right and as)
the beneficially interested party)
subject to the trusteeship of the)
UNITED STATES OF AMERICA;)
ERNEST L. STENSGAR,)
LAWRENCE ARIPIA, MARGARET)
JOSE', DOMINICK CURLEY, AL)
GARRICK, NORMA PEONE and)
HENRY SIJOHN, individually, in)
their official capacity and on)
behalf of all enrolled members of)
the COEUR D'ALENE TRIBE OF)
IDAHO,)

Plaintiffs - Appellants)

vs.)

STATE OF IDAHO; CECIL D.)
ANDRUS, GOVERNOR; PETE)
CENARRUSA, SECRETARY OF)
STATE; LARRY ECHOHAWK,)
ATTORNEY GENERAL; J.D.)
WILLIAMS, AUDITOR; JERRY)
EVANS, SUPERINTENDENT OF)
PUBLIC INSTRUCTION; KEITH)
HIGGINSON, DIRECTOR, DEPT.)
OF WATER RESOURCES; each)
individually and in his official)
capacity; IDAHO STATE BOARD)

U.S. COURT
OF APPEALS
DOCKET NO.
92-36703

LOWER COURT
DOCKET
NO.
CV-91-437-HLR
District of
Idaho (Boise)

NOTICE OF
FILINGS

(Filed
Oct. 24, 1994)

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OF LAND COMMISSIONERS; and)
IDAHO STATE DEPARTMENT OF)
WATER RESOURCES)
Defendants - Appellees)
_____)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO
HONORABLE HAROLD RYAN PRESIDING

RAYMOND C. GIVENS
SHANNON D. WORK
GIVENS, FUNKE & WORK
424 Sherman, Suite 308
P.O. Box 969
Coeur d'Alene, ID 83816-0969
208/667-5486 Telephone
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Comes now Coeur d'Alene Tribe to give notice to the
Court of the filing of the below listed documents in the
new action of *United States v Idaho*, U.S.D.Ct. Id.
#CIV-94-0328-EJL.

United States v. Idaho currently involves many, but not
all of the same issues that the District Court ruled it did
not have jurisdiction to consider in this case. The Tribe's
proposed Complaint in Intervention would raise all
issues that the District Court felt it did not have jurisdic-
tion to consider against Defendant, State of Idaho.

The attached documents which have been filed or
proposed are:

1. United States' Complaint.
2. State of Idaho's Answer & Counterclaim.

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3. United States' Answer to Counterclaim.
4. Coeur d'Alene Tribe's Motion to Intervene
5. Coeur d'Alene Tribe's Proposed Complaint &
Answer to Counterclaim in Intervention.

DATED this 20th day of October, 1994.

Respectfully submitted,
GIVENS, FUNKE & WORK
/s/ Raymond C. Givens
RAYMOND C. GIVENS

LOIS J. SCHIFFER
Acting Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

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Attorneys for Plaintiff,
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF IDAHO

In re suit to quiet title to that
portion of the bed and banks of
Coeur d'Alene Lake and St. Joe River
lying within the exterior boundaries
of the 1873 Coeur d'Alene Reservation

UNITED STATES OF AMERICA,
Plaintiff,
-vs-
STATE OF IDAHO,
Defendant.

CASE NO. _____
CIV
93-0328-N-EJL

COMPLAINT TO QUIET TITLE

(Filed July 21, 1994)

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its attorney, Hank Meshorer, United States Department of Justice, acting under the authority of the Attorney General of the United States, and, at the request of the Department of the Interior, herewith files its complaint, alleging and stating as follows:

I. PRELIMINARY STATEMENT

1. This is a civil action by the United States to quiet title to that portion of the bed and banks of the Coeur d'Alene Lake (hereinafter "Lake"), and the St. Joe River lying within the exterior boundaries of the 1873 Coeur d'Alene Indian Reservation for the use and benefit of the Coeur d'Alene Tribe (hereinafter "Tribe"). The complaint also seeks a declaration that the defendant has no rights or interest in said bed and banks, as well as an injunction barring the defendant from asserting any right or title to said bed and banks.

II. JURISDICTION AND VENUE

2. The United States is plaintiff in this action. This court has jurisdiction under 28 U.S.C. §§ 1345, 1331 and 2202-2202.

3. The land at issue is located in Kootenai and Benewah Counties, Idaho. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b) and Local Rules of the United States

District Court for the District of Idaho, Rule 3.2, Northern Calendar.

III. PARTIES

4. The plaintiff, UNITED STATES OF AMERICA, brings this action in its own capacity and as trustee for the benefit of the Coeur d'Alene Tribe of Idaho and its individual Members.

5. The defendant, STATE OF IDAHO, is one of the 50 states within whose exterior boundary is located the Coeur d'Alene Indian Reservation and the beds and banks at issue herein.

IV. GENERAL ALLEGATIONS

6. By virtue of the Treaty with Great Britain in 1846, 9 Stat. 869, the United States purchased from Great Britain the Oregon Territory, which included the beds and banks at issue herein.

7. In 1863 the United States Congress established the Territory of Idaho, but specifically exempted all Indian territory from the Territory of Idaho. 12 Stat. 808, ch. 117.

8. On November 8, 1873, by Executive Order, the Coeur d'Alene Indian Reservation was established within the aboriginal homeland of the Coeur d'Alene Tribe as follows:

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory, viz: Beginning at the

point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of said ridge to the place of beginning.

All of Coeur d'Alene Lake and the St. Joe River were thus included within the 1873 Reservation except for small portions of the Lake where the northern shoreline meandered across the direct line from the Coeur d'Alene Mission to the source of the Spokane River. See attached map (Exhibit 1), which by this reference is incorporated as if set forth verbatim herein.

9. In 1889, the Coeur d'Alene Tribe ceded to the United States the approximate northern one-third of the 1873 Reservation, including approximately the northern two-thirds of the Lake. The 1889 cession agreement described the new reservation's boundaries as follows:

Beginning at the northeast corner of the said reservation, thence running along the north boundary line north 67° 29' west to the head of the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence southerly along west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary of the said reservation; thence northerly along the said east boundary line to the place of beginning.

26 Stat. 1030 (1891). See attached map (Exhibit 1).

10. In 1894, the Tribe ceded to the United States a one-mile strip of land known as the "Harrison Strip," as follows:

Beginning at a point on the north line of the reservation, on the east bank of the mouth of the Coeur d'Alene River, and running due south one mile, thence due east parallel with the north line to the east boundary line, thence north on the east boundary line to the northeast corner of the reservation, thence west on the north boundary line to the point of beginning.

Act of August 15, 1894, ch. 290, 28 Stat. 322. Such cession slightly altered the above-noted 1889 Reservation boundary across the lake. See attached map (Exhibit 1).

11. In 1908, the United States withdrew from allotment and settlement and reserved certain lands approximate to

the southern extreme of the Lake and now known as "Heyburn State Park," as follows:

Sections one, two and twelve, township forty-six north range four west, Boise meridian; sections thirty-five and thirty-six, township forty-seven north, range four west, Boise meridian; all of those portions of sections two, three, four, five, six, seven, eight, nine, ten, and eleven, township forty-six north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township; all of those portions of sections thirty-one and thirty-two, township forty-seven north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township.

35 Stat. 79. See attached map (Exhibit 1).

12. By virtue of the above-described 1889 and 1894 cession agreements and the 1908 withdrawal and reservation, however, the Coeur d'Alene Tribe did not at any time cede to the United States any of those portions of the bed and banks of the approximate southern one-third of the Lake or of the St. Joe River still remaining within the Coeur d'Alene 1873 Reservation. Such remaining bed and banks are still held in trust by the United States for the benefit of the Coeur d'Alene Indian Tribe.

13. The Coeur d'Alene Tribe and its members are now in possession of those portions of the said bed and banks in question located within the Coeur d'Alene Indian Reservation, which include the bed and banks of the approximate southern one-third of the Lake as well as certain portions of the St. Joe River.

14. By virtue of the Idaho Admission Bill the defendant was admitted to the Union in 1890. Idaho Admission Bill § 1 (1890). 26 Stat. 215. Such Admission Bill accepted and ratified the fact that Article XXI, Section 19 of Idaho's Constitution disclaimed all right and title to lands owned or held by any Indians or Indian tribes located within its borders.

15. The defendant is claiming some right, title or interest to all of the beds and banks of the navigable waterways within its state, including the subject bed and banks, and is also asserting the right to possession of those lands. See Idaho Code § 58-1304 (formerly Idaho Code § 58-142). The claims of the defendant are null and void and of no effect.

16. The construction of docks, piers, floats, pilings, breakwaters, boat ramps and other such aids to navigation upon the beds of navigable lakes is permitted in Idaho only upon the payment of fees to the defendant. See Idaho Code, § 58-1307 (formerly Idaho Code § 58-148).

17. Pursuant to Idaho Code, § 58-1306 (formerly Idaho Code § 58-147) the defendant, without the permission or consent of the United States or the Tribe, has approved and issued permits for the construction of docks, piers, floats, pilings, breakwaters, boat ramps and other such aids to navigation within the southern one-third of Coeur d'Alene Lake.

18. The plaintiff, on behalf of the Coeur d'Alene Tribe, is entitled to a judgment: (1) quieting its title to the bed and banks of the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the bed and

banks of the St. Joe River located within the Coeur d'Alene Reservation, to be held for the use and benefit of the Coeur d'Alene Tribe and its members; (2) upholding the right of possession of the Coeur d'Alene Tribe and its members to those lands, and (3) declaring that the defendants have no right to title or interest in such lands and no right of possession thereof.

19. The plaintiff and the Coeur d'Alene Tribe will continue to suffer irreparable injury unless judgment is entered by this court upholding their title and right to possession of the bed and banks of the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the bed and banks of the St. Joe River situate within the Coeur d'Alene Indian Reservation. The Plaintiff has no other adequate remedy at law.

WHEREFORE, the plaintiff, on behalf of the Coeur d'Alene Tribe prays that this court enter judgment and decree as follows:

(1) Quieting the title of the United States to the bed and banks of the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the bed and banks of the St. Joe River located within the 1873 Coeur d'Alene Indian Reservation for the use and benefit of the Coeur d'Alene Tribe;

(2) Declaring that the plaintiff, as trustee and for the benefit and use of the tribe, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the beds and banks of the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the beds and banks of the St. Joe River located within the 1873 Coeur d'Alene Indian Reservation.

(3) Declaring that the defendant has no right to title or otherwise interest in or to the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the bed and banks of the St. Joe River located within the 1873 Coeur d'Alene Indian Reservation.

(4) Preliminarily and permanently enjoining the defendant from asserting any right, title or otherwise interest in or to the beds and banks of the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the [sic] and banks of the St. Joe River located within the 1873 Coeur d'Alene Indian Reservation or otherwise interfering in any way with the exclusive possession, use and occupancy of such lands by the United States, the Coeur d'Alene Tribe and its members;

(5) For the costs of this action and for such other relief that the court may deem [sic] appropriate.

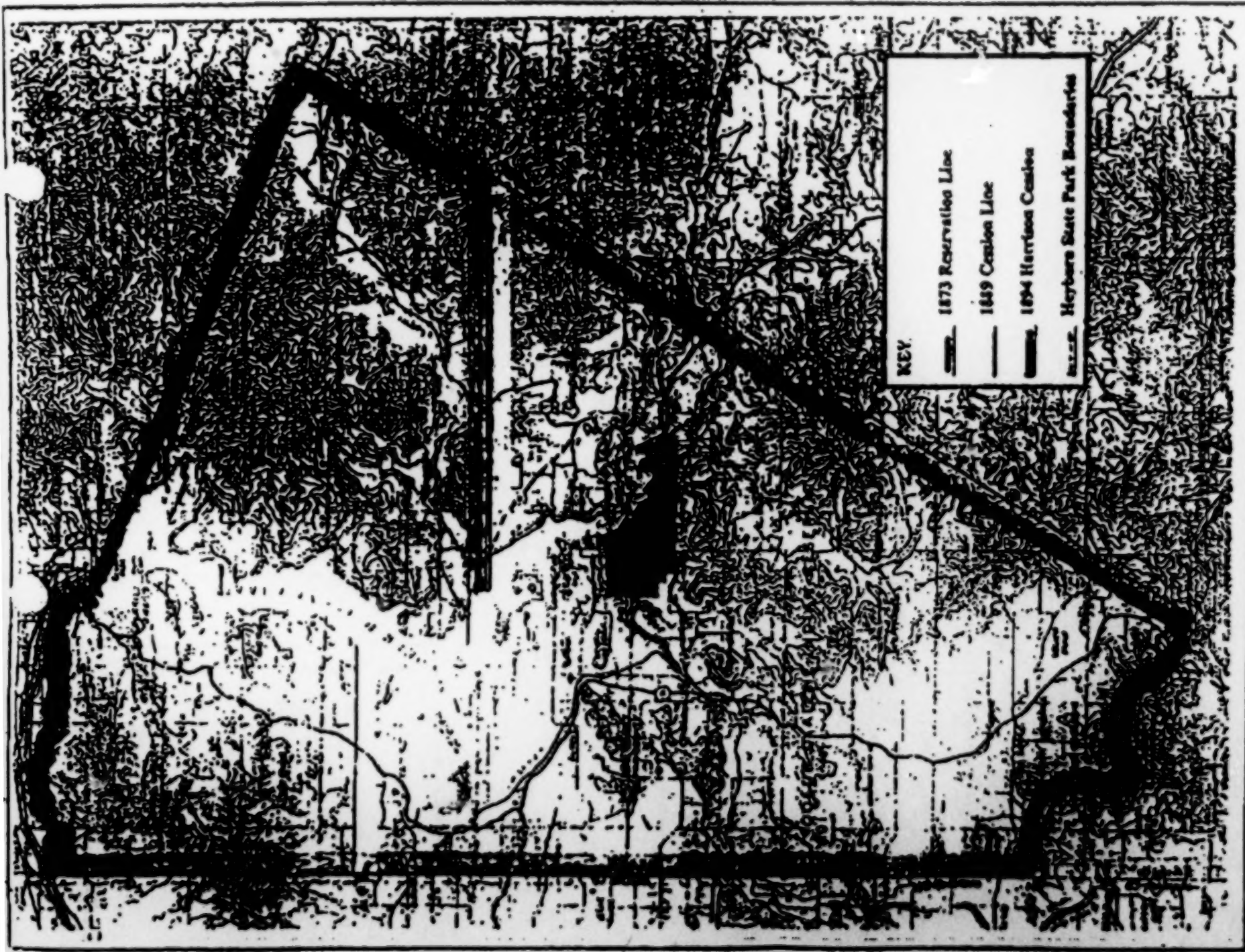
Done this 19th day of July, 1994.

Respectfully submitted,

LOIS SCHIFFER
ACTING ASSISTANT ATTORNEY
GENERAL
UNITED STATES DEPARTMENT
OF JUSTICE
ENVIRONMENT AND NATURAL
RESOURCES DIVISION

BETTY RICHARDSON
UNITED STATES ATTORNEY
DISTRICT OF IDAHO

/s/ Hank Meshorer
HAND MESHORER
CHIEF, INDIAN RESOURCES
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Map 27: This map shows Coeur d'Alene Reservation boundary changes that affected ownership of lake and river beds. Map from USGS 1:250,000 Spokane quad.

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ATTORNEYS FOR STATE OF IDAHO

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF IDAHO

In re suit to quiet title to that)	
portion of the bed and banks of)	
Coeur d'Alene Lake and St. Joe	)	Case No. CIV
River lying within the exterior	)	94-0328-N-EJL
boundaries of the 1873 Coeur)	
d'Alene Reservation	)	ANSWER AND
	)	COUNTERCLAIM
	)	(Filed
UNITED STATES OF AMERICA,	)	Aug. 9, 1994)
)	
Plaintiff,)	
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Defendant.)	
)	

Defendant, State of Idaho, in answer to the plaintiff's Complaint to Quiet Title, admits, denies, and alleges as follows:

1.1 Paragraph 1 characterizes the Complaint and therefore contains legal conclusions to which no response is required. To the extent that a response is necessary to such allegations, the Defendant denies that the United States seeks "to quiet title to that portion of Coeur d'Alene Lake . . . and the St. Joe River within the exterior boundaries of the 1873 Coeur d'Alene Indian Reservation," since that statement does not accurately characterize the relief sought by the United States, and further denies all other allegations in paragraph 1.

1.2 Defendant admits the allegations in paragraph 2.

1.3 Defendant admits the allegations in paragraph 3, but notes that the Local Rule addressing venue has recently been amended so that it is denominated as Rule 3.1, not Rule 3.2.

1.4 Defendant admits the allegations in paragraph 4.

1.5 Defendant admits the allegations in paragraph 5.

1.6 Defendant admits the allegations in paragraph 6.

1.7 The allegations contained in paragraph 7 constitute arguments of matters of law to which no response is required. Insofar as the allegations may be construed otherwise, Defendant admits that in 1863 Congress established the Territory of Idaho, but asserts that the Act

establishing the Territory speaks for itself and therefore denies Plaintiff's characterization of the Act.

1.8 The allegations contained in paragraph 8 constitute arguments of matters of law to which no response is required. Insofar as the allegations may be construed otherwise, Defendant admits that the Executive Order was issued on November 8, 1873, but asserts that the Order speaks for itself and therefore denies Plaintiff's characterization of the Order.

1.9 In regard to the allegations in paragraph 9, Defendant admits that the Coeur d'Alene Tribe in 1889 entered into an agreement with the United States whereby the Tribe ceded any and all interests it had in the northern third of the 1873 Reservation, including the northern two-thirds of Lake Coeur d'Alene, and admits the boundaries of the cession as described, but denies any inference that the Coeur d'Alene Tribe had any ownership, title or right of exclusive possession in the beds and banks of Lake Coeur d'Alene prior to the cession.

1.10 Defendant admits the allegations in paragraph 10.

1.11 Defendant admits the allegations in paragraph 11 that the United States in 1908 withdrew and reserved certain lands now known as Heyburn State Park, admits the provided description of the boundaries of Heyburn State Park, but asserts that the Act withdrawing the lands speaks for itself and therefore denies Plaintiff's characterization of the Act.

1.12 Defendant denies the allegations in paragraph 12.

1.13 Defendant denies the allegations in paragraph 13.

1.14 The allegations contained in paragraph 14 constitute arguments of matters of law to which no response is required. Insofar as the allegations may be construed otherwise, Defendant admits that in 1890 Idaho was admitted to the Union by virtue of the Idaho Admission Bill, admits that the Admission Bill accepted and ratified the Idaho Constitution, but asserts that the Admission Bill and the Idaho Constitution speak for themselves and therefore denies Plaintiff's characterizations of the Admission Bill and the Idaho Constitution.

1.15 Defendant admits that it claims right, title and interest in, and the right of possession of, the beds and banks of all navigable waters within the state of Idaho, including the subject beds and banks, and denies all other allegations in paragraph 15.

1.16 Defendant admits the allegations in paragraph 16.

1.17 Defendant admits that it has approved and issued permits for the construction of docks, piers, floats, pilings, breakwaters, boat ramps and other aids to navigation in the southern third of Lake Coeur d'Alene, and denies all other allegations in paragraph 17.

1.18 Defendant denies the allegations in paragraph 18.

1.19 Defendant denies the allegations in paragraph 19.

1.20 Defendant has incurred costs, expenses, and attorney fees in defending against this action.

AFFIRMATIVE DEFENSES

The Defendant alleges the following affirmative defenses:

First Affirmative Defense

2.1 The Complaint to Quiet Title fails to state a cause of action or claim upon which relief can be granted.

Second Affirmative Defense

3.1 Any reservation of the beds and banks of Lake Coeur d'Alene and the St. Joe River by the President of the United States that purported to defeat the State of Idaho's equal footing entitlement to such beds and banks was unconstitutional and therefore null and void.

Third Affirmative Defense

4.1 By virtue of the Treaty with Great Britain in 1846, 9 Stat. 869, the United States purchased from Great Britain the Oregon Territory, which included the beds and banks claimed by the United States in this action.

4.2 After the United States acquired from Great Britain the beds and banks claimed by the United States in this action, the United States held title to those beds and banks in trust for the future state of Idaho.

4.3 Prior to July 3, 1890, there was no authorized federal reservation of the beds and banks claimed by the United States in this action.

4.4 Prior to July 3, 1890, there was no authorized federal conveyance, to the Coeur d'Alene Tribe or any other party, of the beds and banks claimed by the United States in this action.

4.5 On July 3, 1890, the United States Congress admitted the State of Idaho into the Union on an equal footing with every other state. Under the terms of the United States Constitution, the admission of Idaho into the Union vested the State of Idaho with title to the beds and banks claimed by the United States in this action.

4.6 Nothing in the Idaho Constitution or Idaho Admission Bill disclaims or divests the State of Idaho's sovereign title to the beds and banks claimed by the United States in this action.

4.7 The State of Idaho has sovereign title to the beds and banks claimed by the United States in this action.

Fourth Affirmative Defense

5.1 The Defendant reasserts the allegations in paragraphs 4.1 through 4.7 of the Third Affirmative Defense set forth in this Answer and incorporates them in this Fourth Affirmative Defense as though fully set forth herein.

5.2 The Defendant asserts the following as an alternative defense or claim: even if the State of Idaho's equal footing title did not extend to the beds and banks of Lake Coeur d'Alene and the St. Joe River as a result of its admission into the Union on July 3, 1890, the State of Idaho has title to all lands within Heyburn State Park as a result of the following federal actions:

5.2.1 In 1908, Congress authorized the Secretary of the Interior to convey the following lands to the State of Idaho to be maintained as a public park:

Sections one, two and twelve, township forty-six north range four west, Boise meridian; sections thirty-five and thirty-six, township forty-seven north, range four west, Boise meridian; all of those portions of sections two, three, four, five, six, seven, eight, nine, ten, and eleven, township forty-six north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township; all of those portions of sections thirty-one and thirty-two, township forty-seven north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township.

35 Stat. 79.

5.2.2 In 1911, the United States conveyed to the State of Idaho by Patent No. 213295 exclusive possession of all lands within the boundaries described in paragraph 5.2.1, with the proviso that the lands were to revert to the United States if the State ceased to use the lands as a public park.

5.3 The area described by the boundaries of Patent No. 213295 includes portions of the beds and banks of the southern third of Lake Coeur d'Alene and the associated navigable waters commonly deemed to be part of Lake Coeur d'Alene, including but not limited to Lake Chatcolet.

5.4 On December 30, 1976, the State of Idaho filed in this Court a complaint seeking a declaratory judgment that it remained in compliance with the terms of Patent No. 213295. *State of Idaho v. Kleppe*, CIV 1-76-231.

5.5 On September 7, 1977, the United States filed in this Court a complaint seeking to quiet title to the lands within the boundaries described in Patent No. 213295, alleging that the State had violated the terms of the patent and therefore forfeited its title. *United States v. State of Idaho, et al.*, CIV 77-2058.

5.6 On cross-motions for summary judgment, this Court held that Patent No. 213295 conveyed to the State of Idaho a fee simple title subject to a condition subsequent, that the condition subsequent had not been violated, and therefore the State of Idaho was entitled to summary judgment.

5.7 Under the doctrine of *res judicata*, the United States remains bound by this Court's judgment affirming the State of Idaho's fee title to the lands conveyed by Patent No. 213295.

COUNTERCLAIMS

Defendant-Counterclaimant State of Idaho, by and through counsel, hereby submits its Counterclaim in this matter seeking to quiet its sovereign title to the beds and banks of the navigable waters claimed by the Plaintiff-Counterdefendant.

Defendant-Counterclaimant counterclaims and alleges as follows:

First Counterclaim

6.1 The Counterclaimant is the State of Idaho, a sovereign state of the United States.

6.2 The Counterdefendant is the United States of America.

6.3 The Court has jurisdiction to hear this counterclaim under 28 U.S.C. §§ 1331, 1345, 1346, 2409a, and Rule 13 of the Federal Rules of Civil Procedure.

6.4 Venue is properly in this Court pursuant to 28 U.S.C. § 1391(b) and Local Rule 21.

6.5 The Counterclaimant reasserts the allegations in paragraphs 4.1 through 4.7 of the Third Affirmative Defense set forth in this Answer and incorporates them in this Counterclaim as though fully set forth herein.

6.6 The Counterclaimant is entitled to a judgment (1) quieting its title to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River Located within the Coeur d'Alene Reservation; (2) upholding the Counterclaimant's right of possession to those lands; and (3) declaring that the Counterdefendant has no estate, right, title or interest in such lands and no right of possession thereof.

Second Counterclaim

7.1 The Counterclaimant reasserts the allegations in paragraphs 6.1 through 6.4 of the First Counterclaim set forth in this Answer and incorporates them in this Second Counterclaim as though fully set forth herein.

7.2 The Counterclaimant reasserts the allegations in paragraphs 4.1 through 4.7 of the Third Affirmative Defense set forth in this Answer and incorporates them in this Second Counterclaim as though fully set forth herein.

7.3 The Counterclaimant reasserts the allegations in paragraphs 5.1 through 5.7 of the Fourth Affirmative Defense set forth in this Answer and incorporates them in this Second Counterclaim as though fully set forth herein.

7.4 The Counterclaimant is entitled to a judgment (1) quieting its title to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River located within Heyburn State Park; (2) upholding the Counterclaimant's right of possession to those lands; and (3) declaring that the Counterdefendant has no estate, right, title or interest in such lands and no right of possession thereof.

PRAYER FOR RELIEF

WHEREFORE, the Defendant-Counterclaimant respectfully prays that this Court enter a judgment and decree as follows:

A. Dismissing the Complaint to Quiet Title with prejudice and declaring that Plaintiff take nothing by its complaint;

B. Quieting the State of Idaho's sovereign title to those portions of Lake Coeur d'Alene and the St. Joe River within the present boundaries of the Coeur d'Alene Reservation and Heyburn State Park;

C. Declaring that the State of Idaho holds sovereign title to, and is entitled to the exclusive use and occupancy

of, the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River within the present boundaries of the Coeur d'Alene Reservation and Heyburn State Park;

D. Declaring that the Plaintiff has no estate, right, title or other interest in or to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River within the present boundaries of the Coeur d'Alene Reservation and Heyburn State Park;

E. Permanently enjoining the Plaintiff from asserting any estate, right, title or other interest in or to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River within the present boundaries of the Coeur d'Alene Reservation and Heyburn State Park; or otherwise interfering in any way with the State of Idaho's exclusive possession, use, and occupancy of such lands.

F. Awarding Defendant its costs and attorney fees in this proceeding to the extent that such are allowed by the terms of 28 U.S.C. § 2412 and other applicable laws.

G. Granting Defendant whatever further and additional relief the Court deems fitting and just.

DATED this 9th day of August, 1994.

LARRY ECHOHAWK
Attorney General

By: /s/ Steven W. Strack
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Chief, Natural Resources
Division

/s/ Steven W. Strack
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Attorneys for Plaintiff and Counter-Defendant
UNITED STATES OF AMERICA

**UNITED STATES DISTRICT COURT FOR THE
 DISTRICT OF IDAHO**

In re suit to quiet title to that)
 portion of the bed and banks of)
 Coeur d'Alene Lake and St. Joe)
 River lying within the exterior)
 boundaries of the 1873 Coeur)
 d'Alene Reservation)

UNITED STATES OF AMERICA,)
 Plaintiff,)
 -vs-)
STATE OF IDAHO,)
 Defendant.)

CASE NO.
 CIV 94-0328-N-ELJ
**ANSWER TO
 COUNTERCLAIM**
 (Filed Oct. 11, 1994)

STATE OF IDAHO,)
Counter-claimant,)
UNITED STATES OF AMERICA,)
Counter-defendant)

ANSWER TO COUNTERCLAIM

COMES NOW the Counter-defendant, UNITED STATES OF AMERICA, by and through its attorney, Hank Meshorer, Chief, Indian Resources Section, United States Department of Justice, and, using the paragraph delineation of the Counterclaim, herewith files its ANSWER TO COUNTERCLAIM as follows:

First Counterclaim

6.1. Counter-defendant admits the allegations contained in paragraph 6.1 of the Counterclaim.

6.2. Counter-defendant admits the allegations contained in paragraph 6.2 of the Counterclaim.

6.3. Paragraph 6.3 of the Counterclaim constitute [sic] arguments and conclusions of law which require no answer. Insofar as the allegations may be construed otherwise and an answer may be required, however, the counter-defendant denies all allegations in said paragraph 6.3.

6.4. Counter-defendant admits the allegations contained in paragraph 6.4 of the Counterclaim.

6.5. Paragraph 6.5, which incorporates by reference the allegations contained in paragraphs 4.1 through 4.7 of

Defendant's Answer, constitute arguments and conclusions of law which require no answer. Insofar as the allegations may be construed otherwise and an answer may be required, counter-defendant only admits the allegations contained in said paragraph 4.1, and denies all other allegations contained in said paragraphs 4.2 through 4.7, and 6.5.

6.6. Paragraph 6.6 of the Counterclaim constitute [sic] arguments and conclusions of law which require no answer. Insofar as the allegations may be construed otherwise and an answer may be required, however, counter-defendant denies all allegations contained in said paragraph 6.6.

Second Counterclaim

7.1. Paragraph 7.1 of the Counterclaim incorporates by reference the allegations contained in paragraphs 6.1 through 6.4 of the First Counterclaim. Counter-defendant by this reference herewith likewise incorporates its prior responses to said paragraphs 6.1 through 6.4 as if set forth verbatim herein.

7.2. Paragraph 7.2 of the Counterclaim incorporates by reference the allegations contained in paragraph 6.5 of the Counterclaim, and the counter-defendant herewith incorporates its answer to said paragraph 6.5 as if set forth verbatim herein.

7.3. Paragraph 7.3 of the Counterclaim, which incorporates by reference the allegations contained in paragraphs 5.1 through 5.7 of Defendant's Answer, constitute arguments and conclusions of law which require no

answer. Insofar as the allegations may be construed otherwise and an answer may be required, however, the counter-defendant denies all allegations contained in said paragraphs 5.1 through 5.7, except as follows:

5.2.1. Counter-defendant admits the allegations contained in paragraph 5.2.1 of Defendant's Answer.

5.3. Counter-defendant admits the allegations contained in paragraph 5.3 of Defendant's Answer.

5.4. Counter-defendant admits the allegations contained in paragraph 5.4. of Defendant's Answer.

5.5. Counter-defendant admits the allegations contained in paragraph 5.5 of Defendant's Answer.

8. Counter-defendant denies each and every material allegation of counter-claimants Counterclaim not heretofore expressly admitted.

9. Counter-defendant has incurred costs, expenses, and attorney fees in defending this action.

AFFIRMATIVE DEFENSES

As to both the First and Second Counterclaim, the Counter-defendant alleges the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

The Counterclaims fail to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Court lacks the requisite matter jurisdiction over the counterclaims.

WHEREFORE, having fully answered, the Counter-defendant prays that the Counterclaim be dismissed with prejudice and that the counter-claimants take nothing thereby; Counter-defendants have and recover is [sic] costs incurred herein; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted this 7 day of October, 1994.

LOIS SCHIFFER
ASSISTANT ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF
JUSTICE
ENVIRONMENT AND NATURAL
RESOURCES DIVISION

BETTY RICHARDSON
UNITED STATES ATTORNEY
DISTRICT OF IDAHO

/s/ Hank Meshorer
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 FAX: (208) 667-4695
 Attorneys for Coeur d'Alene Tribe

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IDAHO

In re suit to quiet title to that)	
portion of the bed and banks of)	
Coeur d'Alene Lake and St. Joe)	
River lying within the exterior)	
boundaries of the 1873 Coeur	)	Case No.
d'Alene Reservation	)	CIV-94-0328-N-EJL
<hr/>		
UNITED STATES OF AMERICA,	)	MOTION TO
Plaintiff,	)	INTERVENE BY
	)	COEUR D'ALENE
vs.	)	TRIBE
)	
STATE OF IDAHO,	)	(Filed Oct. 21, 1994)
Defendant.)	
<hr/>		

COMES NOW the Coeur d'Alene Tribe by and through its attorney, RAYMOND C. GIVENS, to move for Leave to Intervene as a plaintiff pursuant to FRCP 24(a)(2) (Intervention As A Matter Of Right) and FRCP 24(b)(2) (Permissive Intervention). Leave is sought to file

the accompanying Complaint and Answer to Counterclaim in Intervention and to fully participate as a Plaintiff and Counterdefendant.

This motion is supported by the accompanying Memorandum which sets out in detail the grounds for intervention, and by the Affidavit of Ernest L. Stensgar.

DATED this 20th day of October, 1994.

/s/ Raymond C. Givens
 RAYMOND C. GIVENS
 Attorney for Coeur d'Alene Tribe

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Attorneys for Coeur d'Alene Tribe

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IDAHO

In re suit to quiet title to that)	
portion of the bed and banks of)	
Coeur d'Alene Lake and St. Joe)	
River lying within the exterior)	
boundaries of the 1873 Coeur)	
d'Alene Reservation)	
_____	)	Case No.
UNITED STATES OF AMERICA,	)	CIV-94-0328-N-EJL
Plaintiff,)	
Counterdefendant)	
and)	
COEUR D'ALENE TRIBE,)	
Plaintiff in Intervention	)	COMPLAINT &
Counterdefendant in	)	ANSWER TO
Intervention	)	COUNTERCLAIM
	)	IN INTERVENTION
vs.)	
STATE OF IDAHO,)	
Defendant,	)	(Received
Counterclaimant.	)	Oct. 21, 1994)
_____)	

COMES NOW Plaintiff Intervenor, Coeur d'Alene Tribe (Tribe) through its attorney, RAYMOND C. GIVENS of Givens, Funke & Work, to complain, allege, state and answer the State of Idaho's Counterclaim as follows:

COMPLAINT

I.

Preliminary Statement

1. This is a quiet title, declaratory judgment and injunction action regarding the beds and banks of navigable water courses and waters within the Coeur d'Alene Reservation. The action is brought under theories of both "aboriginal or Indian title" and "recognized title" (granted or reserved).

II.

Jurisdiction & Venue

2. This Court has original jurisdiction for this action under 28 U.S.C. 1345, 1331 and 1346. This Court has supplemental jurisdiction over the Tribe's intervention under 28 U.S.C. 1362 and 1367.

3. Venue is proper under 28 U.S.C. 1391(b). The case is appropriately on the Court's Northern Calendar under Local Rule 3.2.

III.

Parties

4. Coeur d'Alene Tribe (Tribe) is a federally recognized Indian tribe. The Tribe is the aboriginal title holder and

beneficially interested party of the reorganized title of the beds, banks, waters, and water rights at issue.

5. The United States of America is the trustee for the Coeur d'Alene Tribe.

6. The State of Idaho (State) is one of the 50 states within whose exterior boundary is located the Coeur d'Alene Reservation and the beds, banks and waters at issue herein.

IV.

General Allegations

7. By virtue of the Treaty with Great Britain in 1846, 9 Stat. 869, the United States purchased from Great Britain the Oregon Territory, which included the beds and banks at issue herein subject to the Tribe's right of exclusive use and occupancy under the doctrine of aboriginal Indian title.

8. In 1863 the United States Congress established the Territory of Idaho, but specifically exempted all Indian territory from the Territory of Idaho. 12 Stat. 808, ch. 117.

9. On November 8, 1873, by Executive Order, the Coeur d'Alene Reservation was established within the aboriginal homeland of the Coeur d'Alene Tribe as follows:

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory, viz: Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly

south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing range between Pine and Latah (or Hangman's) Creek; thence along the top of said ridge to the place of beginning.

The beds, banks and waters of all of Lake Coeur d'Alene, the Coeur d'Alene River downstream from Cataldo and all lakes lateral to such reach of the Coeur d'Alene River, the St. Joe River downstream from St. Maries and all lakes lateral to such reach of the St. Joe River, and the southern half of the Spokane River from Lake Coeur d'Alene to the boundary between Washington and Idaho are included in the 1873 Coeur d'Alene Reservation.

10. In 1889, the Coeur d'Alene Tribe ceded to the United States toe approximate northern one-third of the upland areas of the 1873 Reservation. The 1889 cession agreement described the area ceded as follows:

Beginning at the northeast corner of the said reservation, thence running along the north

boundary line north 67 29' west to the head of the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence southerly along west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary of the said reservation; thence northerly along the said east boundary line to the place of beginning.

26 Stat. 1030 (1891).

11. In 1894, the Tribe ceded to the United States a one-mile strip of upland known as the "Harrison Strip," as follows:

Beginning at a point on the north line of the reservation, on the east bank of the mouth of the Coeur d'Alene River, and running due south one mile, thence due east parallel with the north line to the east boundary line, thence north on the east boundary line to the northeast corner of the reservation, thence west on the north boundary line to the point of beginning.

Act of August 15, 1894, ch. 290, 28 Stat. 322.

12. In 1908, the United States, without tribal consent as required by the 1887 Agreement between the Tribe and the United States, withdrew from allotment and settlement and reserved certain lands known as "Heyburn State Park" as follows:

Sections one, two and twelve, township forty-six north range four west, Boise meridian; sections

thirty-five and thirty-six township forty-seven north, range four west, Boise meridian; al [sic] of those portions of sections two, three, four, five, six, seven, eight, nine, ten, and eleven, township forty-six north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township; all of those portions of sections thirty-one and thirty-two, township forty-seven north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township.

35 Stat. 79. See attached map (Exhibit 1).

13. By virtue of the above-described 1889 and 1894 cession agreements and the 1908 withdrawal and reservation, the Coeur d'Alene Tribe did not at any time cede to the United States any of those portions of the bed and banks of navigable watercourses or waters within the Coeur d'Alene 1873 Reservation. The Coeur d'Alene Tribe continues to hold aboriginal or Indian title to the beds and banks of such navigable watercourses and waters. The Coeur d'Alene Tribe also, or in the alternative, holds the beneficial interest in the beds and banks of such navigable watercourses and waters subject to the trusteeship of the United States.

14. The Coeur d'Alene Tribe and its members are now in possession of the said bed and banks of all navigable watercourses and waters located within the 1873 Coeur d'Alene Indian Reservation.

15. By virtue of the Idaho Admission Bill the State was admitted to the Union in 1890. Idaho Admission Bill § 1 (1890). 26 Stat. 215. Such Admission Bill accepted and ratified the fact that Article XXI, Section 19 of Idaho's

Constitution disclaimed all right and title to lands owned or held by any Indians or Indian tribes located within its borders.

16. The State is claiming some right, title or interest to all of the beds, banks of the navigable watercourses and waters within the 1873 Coeur d'Alene Reservation, including the subject beds, banks and waters, and is also asserting the right to possession of those lands, waters and rights thereon. See Idaho Code § 58-1304 (formerly Idaho Code § 58-142), 67-4304. The claims of the defendant are null and void and of no effect. The State's claimed water right is subordinate to the Tribe's aboriginal water rights and reserved water rights.

17. The construction of docks, piers, float, pilings, breakwaters, boat ramps and other such aids to navigation upon the beds and banks of navigable lakes is permitted in Idaho only upon the payment of fees to the State. See Idaho Code, § 58-1307 (formerly Idaho Code § 58-148).

18. Pursuant to Idaho Code, § 58-1306 (formerly Idaho Code § 58-147) the State, without the permission or consent of the United States or the Tribe, has approved and issued permits for the construction of docks, piers, floats, pilings, breakwaters, boat ramps and other such aids to navigation.

19. The Coeur d'Alene Tribe is entitled to a judgment: (1) quieting its title to the beds and banks of navigable watercourses and waters within the 1873 Coeur d'Alene Reservation under its aboriginal or Indian title and/or as the beneficially interested party of the trust relationship with the United States to be held for the use and benefit

of the Coeur d'Alene Tribe and its members; (2) upholding the right of exclusive use, occupancy and possession of the Coeur d'Alene Tribe and its members to those beds and banks of navigable watercourses and waters and enjoining the State's interference therewith, and (3) declaring that the defendants have no right to title or interest in such beds and banks of navigable watercourses and waters and no right of possession thereof.

20. The Coeur d'Alene Tribe will continue to suffer irreparable injury unless judgment is entered by this Court upholding their title and right to exclusive use, occupancy and possession of the bed and banks of navigable watercourses and waters situate within the 1873 Coeur d'Alene Reservation and enjoining the State's interference therewith. The Plaintiff has no other adequate remedy at law.

21. The Coeur d'Alene Tribe is entitled to recover its costs and attorney fees incurred in this action.

V.

Answer to Counterclaim

22. The Tribe admits the factual allegations contained in the State's First Counterclaim paragraphs 6.1, 6.2, 6.3, 6.4.

23. The Tribe generally denies all of the factual allegations and legal conclusions contained in the State's First Counterclaim.

24. The Tribe admits factual allegations contained in Second Counterclaim in that portion of paragraph 7.1 which incorporates 6.1, 6.2, 6.3 and 6.4 and in that portion

of paragraph 7.3 which incorporates paragraphs 5.2.1, 5.4, 5.5.

25. The Tribe generally denies all other factual allegations and legal conclusions contained in the Second Counterclaim.

26. The Tribe has incurred costs and fees in defense of this Counterclaim.

VI.

Affirmative Defenses to Counterclaim

The Coeur d'Alene Tribe asserts the following Affirmative Defenses to the Counterclaim.

1. The Counterclaim fails to state a claim upon which relief can be granted.

2. Count Two of the Counterclaim is barred by res judicata and collateral estoppel.

3. Count Two of the Counterclaim is barred by the State's material breach of any lease to Heyburn Park that it may have, thereby reverting all incidents of ownership to the Tribe and the United States solely as the Tribe's trustee.

WHEREFORE, the Coeur d'Alene Tribe prays that this court enter judgment and decree as follows:

1. Quieting the title of the Coeur d'Alene Tribe to the bed and banks of navigable watercourses and waters within the 1873 Coeur d'Alene Reservation under aboriginal or Indian title and/or as the beneficially interested party of trusteeship of the United States to the recognized title thereof;

2. Declaring that the Coeur d'Alene Tribe and its members are entitled to the exclusive use, occupancy, possession and right to the quiet enjoyment of the beds and banks of navigable watercourses and waters within the 1873 Coeur d'Alene Reservation.

3. Declaring that the State has no right to title or otherwise interest in or to the beds and banks of navigable watercourses and waters within the 1873 Coeur d'Alene Reservation.

4. Declaring that the water right issued by the State pursuant to 67-4304 is invalid or inferior to the aboriginal and/or reserved water rights of the Tribe.

5. Preliminary and permanently enjoining the State from asserting any right, title or otherwise interest in or to the beds and banks of navigable watercourses and waters within the 1873 Coeur d'Alene Reservation or from otherwise interfering in any way with the exclusive use, occupancy or possession of such beds and banks of navigable watercourses and waters by the Coeur d'Alene Tribe and its members;

6. For the costs and attorney fees of this action.

7. For such other relief that the Court may deem appropriate.

DATED this 20 day of October, 1994.

/s/ Raymond C. Givens
RAYMOND C. GIVENS
Attorney for Coeur d'Alene Tribe

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Supreme Court, U. S.

~~F I L E D~~

MAY 2 1995

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1994

STATE OF IDAHO; PHIL BATT, GOVERNOR; PETE
CENARRUSA, SECRETARY OF STATE; ALAN G. LANCE,
ATTORNEY GENERAL; J.D. WILLIAMS, CONTROLLER;
ANNE FOX, SUPERINTENDENT OF PUBLIC
INSTRUCTION; KEITH HIGGINSON, DIRECTOR, DEPT. OF
WATER RESOURCES; each individually and in his official
capacity; IDAHO STATE BOARD OF LAND
COMMISSIONERS; and IDAHO STATE DEPARTMENT OF
WATER RESOURCES,

v.

Petitioners,

COEUR d'ALENE TRIBE, in its own right and as the
beneficially interested party subject to the trusteeship of the
UNITED STATES OF AMERICA; ERNEST L. STENSGAR,
LAWRENCE ARIPIA, MARGARET JOSÉ, DOMNICK
CURLEY, AL GARRICK, NORMA PEONE and HENRY
SIJOHN, individually, in their official capacity and on
behalf of all enrolled members of COEUR d'ALENE TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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No. 94-1474

—◆—
In The
Supreme Court of the United States
October Term, 1994
—◆—

STATE OF IDAHO; PHIL BATT, GOVERNOR; PETE
CENARRUSA, SECRETARY OF STATE; ALAN G. LANCE,
ATTORNEY GENERAL; J.D. WILLIAMS, CONTROLLER; ANNE
FOX, SUPERINTENDENT OF PUBLIC INSTRUCTION; KEITH
HIGGINSON, DIRECTOR, DEPT. OF WATER RESOURCES; each
individually and in his official capacity; IDAHO STATE BOARD OF
LAND COMMISSIONERS; and IDAHO STATE DEPARTMENT OF
WATER RESOURCES,

Petitioners,

v.

COEUR d'ALENE TRIBE, in its own right and as the beneficially
interested party subject to the trusteeship of the UNITED STATES
OF AMERICA; ERNEST L. STENSGAR, LAWRENCE ARIPIA,
MARGARET JOSÉ, DOMNICK CURLEY, AL GARRICK, NORMA
PEONE and HENRY SIJOHN, individually, in their official capacity
and on behalf of all enrolled members of COEUR d'ALENE TRIBE,

Respondents.

—◆—
On Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit
—◆—

REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
—◆—

The State of Idaho and the other named defendants reply
to the arguments raised in the Respondents' Brief in Opposi-
tion to the Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit in this case.

ARGUMENT IN REPLY

1. Idaho Did Not Waive Its Eleventh Amendment Immunity To The Tribe's Action By Filing A Counterclaim In A Related Suit Initiated By The United States.

The Coeur d'Alene Tribe asserts that the Eleventh Amendment does not bar the Tribe's action because Idaho has filed a counterclaim asserting title to the disputed submerged lands in the case of *United States v. Idaho*, 94-0328 (D. Idaho). The Tribe's argument fails for several reasons. First, the Tribe's argument does not account for the different claims at issue in the two cases. The Tribe's original action sought title to all submerged lands within the boundaries of the Coeur d'Alene Reservation as it was originally established in 1873.¹ This included all of Lake Coeur d'Alene, approximately 20 miles of the Coeur d'Alene River, approximately 10 miles of the Spokane River, and approximately 6 miles of the St. Joe River.

After the dismissal of the Tribe's action, the United States brought a quiet title action against the State of Idaho, but limited its claim to the submerged lands within the *present* boundaries of the Coeur d'Alene Reservation,² thereby excluding the Spokane River, the Coeur d'Alene River, and two-thirds of Lake Coeur d'Alene. It also excluded the submerged lands within Heyburn State Park, which lies within the Reservation and includes a substantial portion of the Lake and the St. Joe River.

In response to the United States' action, the State filed an answer and counterclaim. The purpose of the counterclaim was to ensure that if the State prevailed in the action, it would receive a judgment quieting title to the disputed lands, instead of merely defeating the United States' claims. The State

¹ See Executive Order of November 8, 1873 (hereinafter "1873 Executive Order").

² The boundaries of the Coeur d'Alene Reservation were substantially reduced by a cession agreement negotiated with the Tribe on September 9, 1889, and ratified by Congress on March 3, 1891. 26 Stat. 1027.

intentionally limited its counterclaim to the lands put at issue by the United States' action. This was in accordance with the generally accepted rule that counterclaims against the United States can only be in the nature of recoupment, and cannot enlarge the original action. 6 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 1427 (1990). Thus, the State's counterclaim does not, as the Tribe asserts, raise the issue of ownership of the entire Lake, and does not submit the State to any adjudication by the federal courts beyond the risk of loss already placed upon it by the filing of the United States' action.

Nonetheless, the Tribe asserts that the filing of the counterclaim is an implicit voluntary submission to federal adjudication of all issues relating to the disputed submerged lands. It is true that the sovereign immunity embodied in the Eleventh Amendment may be waived by "voluntary submission" to the jurisdiction of the federal courts. *Clark v. Barnard*, 108 U.S. 436, 447 (1883). The fundamental flaw in the Tribe's argument, however, is that the State's appearance in *United States v. Idaho* was not voluntary. It is well-established that the federal government may bring actions against States in federal court without explicit state consent. *United States v. Texas*, 143 U.S. 621, 646 (1892). Thus, once the United States filed its action, the State was at risk of losing its title to the submerged lands claimed by the United States. By filing the counterclaim for the same lands put at issue by the United States' complaint, the State did not waive its Eleventh Amendment immunity in an entirely separate action involving a much greater risk of loss, both of submerged lands and damages in the form of attorney fees.³

In filing the counterclaim, Idaho also relied on prior decisions of the Idaho federal district court holding that the Attorney General, in representing the State of Idaho before

³ The Tribe's action presents a civil rights claim under 42 U.S.C. § 1983, which could require payment of the Tribe's attorney fees under 42 U.S.C. § 1988.

the federal courts, has no authority to waive Eleventh Amendment immunity. In the case of *Mazur v. Hymas*, 678 F. Supp. 1473 (D. Idaho 1988), the court found as follows:

[T]he only official who could waive the State's immunity in a particular suit is the Attorney General. However, the Idaho Supreme Court has held that even the Attorney General has no authority to waive the State's sovereign immunity. *Howard v. Cook*, 59 Idaho 391, 397-98, 83 P.2d 208, 211 (1938). In *Howard*, the State was a defendant and counterclaimant. The Idaho Supreme Court stated that the Attorney General, by bringing a counterclaim, could waive the State's immunity, but only to the extent of giving the court jurisdiction to decide the State's counterclaim. The Attorney General could not waive sovereign immunity to allow plaintiffs to obtain affirmative relief against the State. *Id.* Since the Attorney General is powerless to waive Idaho's common law sovereign immunity in state court, *a fortiori* he is powerless to waive Idaho's eleventh amendment immunity.

678 F. Supp. at 1474-75. See also *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 467-70 (1945) (holding that Attorney General of Indiana lacked authority to waive state's Eleventh Amendment immunity and therefore dismissing action for lack of consent).

Given this prior decision, the filing of the counterclaim by the Idaho Attorney General cannot be construed as consent to the Tribe's action. Indeed, it would be an absurd result if the filing of a counterclaim in a federal action not subject to the restrictions of the Eleventh Amendment were to be construed as a waiver of immunity in separate actions brought by private parties simply because of the identity of issues. It would be even more absurd if the waiver were expanded to include issues not raised in the federal action.

The shortcomings in the Tribe's argument are demonstrated by its failure to identify a single case where the filing of a counterclaim in an action initiated by the United States has been found to waive state immunity in separate but

similar actions. The closest analogy is the situation where parties intervene or otherwise join actions brought by the United States against a State. In such circumstances, the private party cannot seek to enlarge the suit to include issues not raised by the United States. In *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), the Court noted that "the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes." *Id.* at 103 n.12. In other cases, the presence of the United States in an action has been held to only subject the defendant State to those liabilities raised in the federal complaint. For example, in *Arizona v. California*, 460 U.S. 605 (1983), the Court allowed several Indian tribes to intervene in an action brought by the United States against the States so long as the tribes "do not seek to bring new claims or issues against the States. . . ." *Id.* at 614. The Court reasoned that because the tribes did not seek to present any new claims or issues, but merely sought to participate, "our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Id.* That same reasoning does not apply in the present case, where the Tribe seeks to enlarge the federal district court's authority over the State by subjecting the State to new claims in an entirely separate action.

For the above reasons, there has been no waiver of Idaho's sovereign immunity in this action. The Eleventh Amendment issue presented by the State remains ripe for decision, and the Court should grant review for the reasons provided in the State's Petition.

2. The Idaho Supreme Court Has Never Limited Idaho's Sovereignty To Omit Immunity To Quiet Title Claims.

The Tribe asserts that the holding of the Idaho Supreme Court in *Lyon v. State*, 283 P.2d 1105 (Idaho 1955), defines Idaho's "sovereignty" in such a way that the Eleventh Amendment does not apply to quiet title actions against the State.

The Tribe bases its assertion on the following language from *Lyon*:

A suit to quiet title to land allegedly owned by appellants and to which the Board of Education of the State of Idaho allegedly asserts a claim is not a claim against the Board of Education, or the State, to which it can interpose sovereign immunity as a defense.

The appellants by the proceedings are asserting no claim against the sovereignty, but are attempting to retain what they allegedly own.

283 P. at 1106.

As explained more fully in the State's Brief in Opposition to Cross-Petition For A Writ Of Certiorari, the Tribe simply misreads *Lyon*. The Tribe's error is a classic example of what happens when a party extracts one or two sentences from an opinion without determining how those sentences were applied in the context of the facts of the case. *Lyon* does not limit Idaho's sovereignty. In fact, the court expressly stated that it was not reaching the issue of the State's sovereign immunity because all claims against the State had been abandoned on appeal. *Id.* at 1106.

The true holding in *Lyon* is that claims *against the Board of Education* are not claims against the State. The holding does not turn on common law principles of sovereignty applicable to all state agencies, but is derived from statutory waivers of sovereign immunity specific to the Board of Education. See, e.g., Idaho Code §§ 33-3802, 33-3804 (1948) (Board of Education, in its role as Board of Regents of University of Idaho, is a corporate body and "a separate and independent legal entity" with authority to "sue and be sued"). Thus, by statute, suits against the Board are not suits against the State, as discussed in *State ex rel. Black v. State Bd. of Education*, 196 P. 201 Idaho (1921), one of the authorities cited in *Lyon*:

[T]he board of regents is a constitutional corporation with granted powers, and while functioning within the scope of its authority, is not subject to

the control or supervision of any other branch, board or department of the state government, but is a separate entity, and may sue and be sued, with power to contract and discharge indebtedness, with the right to exercise its discretion with respect to business granted, without authority to contract indebtedness against the state, and in no sense is a suit against the regents one against the state.

196 P. at 205.

The statement in *State ex rel. Black* clarifies the holding in *Lyon*. In both cases, the crucial fact is that the Board of Education is a separate entity with powers to sue and be sued, and therefore claims against the Board are not treated as claims against the State. Thus, the Tribe is simply wrong when it cites *Lyon* as authority for a general limitation of Idaho's sovereignty.

Even if the Tribe were correct in interpreting *Lyon* as a limitation of Idaho's sovereign immunity, it would not affect the State's immunity under the Eleventh Amendment. States must be free to define their sovereign immunity for internal purposes without worrying about the effect of such decisions on their Eleventh Amendment immunity. Thus, this Court has consistently held that a State's waiver of immunity within its own courts is "not determinative of whether [the State] has relinquished its Eleventh Amendment immunity from suit in the federal courts." *Edelman v. Jordan*, 415 U.S. 651, 677 n. 19 (1974). See also *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944) ("When a state authorizes a suit against itself . . . it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts"). Nothing in the *Lyon* decision indicates an intent to waive state immunity within the federal court system. Therefore, the Eleventh Amendment issue presented in the State's Petition is unaffected by the decision in *Lyon*, and review by writ of certiorari should be granted for the reasons provided in the Petition.

3. The Record In This Case Squarely Presents The Issue Of The President's Authority To Defeat A State's Equal Footing Title.

The Tribe asserts that the Court need not examine the authority of the President to defeat a state's equal footing title because there is no conflict between the Ninth Circuit's decision and this Court's prior cases. The Tribe's assertion is not based on any disagreement with the State's basic premise that executive orders are not generally recognized as conveyances of title to Indian tribes. Instead, the Tribe seeks to raise a series of peripheral issues that are apparently intended to convince the Court that congressional acts and state laws have vested the Coeur d'Alene Tribe with title to its Reservation and the submerged lands within it, therefore making it unnecessary to address the effect of the 1873 Executive Order. The Tribe's arguments do not withstand scrutiny.

The Tribe begins by alleging that the Tribe's title to the 1873 Reservation was "statutorily recognized" by Congress when it authorized payment to the Tribe for relinquishment of portions of the Reservation for settlement or for railroad right of ways. Such actions do not, however, distinguish the Coeur d'Alene Reservation from other executive order reservations. By the latter part of the nineteenth century, executive order reservations were common, and compensation was frequently granted to tribes for relinquishment of portions of such reservations. Such history, however, does nothing to undermine this Court's decision in *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), wherein the court distinguished "the character of title enjoyed by the Indians on statute and treaty reservations and that enjoyed by those on executive order reservations." *Id.* at 329. Indeed, the Court in *Sioux Tribe* rejected the plaintiff's argument that Congress, by treating executive order reservations the same as others, had recognized that tribes on all reservations hold the same "degree of ownership." *Id.* at 328-29. Thus, nothing in the congressional acts asserted by the Tribe demonstrate an understanding that the 1873 Executive Order conveyed title of submerged lands to the Tribe.

Secondly, the Tribe asserts that Idaho law at the time of statehood vested riparian landowners with title to adjacent submerged lands. The state cases cited by the Tribe as authority for this proposition, however, were later repudiated by the Idaho Supreme Court. *See Callahan v. Price*, 146 P. 732, 734-35 (Idaho 1915) (Idaho holds title to beds of all navigable waters); *Northern Pacific Ry. Co. v. Hirzel*, 161 P. 854, 859 (Idaho 1916) (noting that earlier decisions suggesting that riparian landowners owned adjacent submerged lands were "legislative" acts and "not judicial"). These holdings are conclusive on the federal courts. *Port of Seattle v. Oregon & Washington R.R. Co.*, 255 U.S. 56, 63 (1921) (decisions of state courts regarding property rights of riparian landowners in submerged lands conclusive on federal courts). Moreover, even if the Tribe's assertion is correct, it is irrelevant, since almost all of the riparian lands adjacent to the disputed waters have passed into private ownership. Only the present landowners would have a valid claim to riparian rights.⁴

Thus, the primary issue raised by the State in its Petition remains intact: may the President, acting without explicit congressional authorization, defeat a state's equal footing title

⁴ The other two issues raised by the Tribe are simply non-issues. The two Agreements referenced by the Tribe, which statutorily established the boundaries of the Coeur d'Alene Reservation, were ratified by Congress on March 3, 1891, eight months after Idaho was admitted to the Union and acquired equal footing title to all submerged lands within its boundaries. The ratification of the Agreements did not "relate back" to their dates of negotiation in 1887 and 1889. The authorization acts for both sets of negotiations expressly provided that any agreement negotiated was not to take effect until ratified. Act of May 15, 1886, 24 Stat. 29, 44; Act of March 2, 1889, 25 Stat. 980, 1002. Both agreements provided that they were not binding on either party until ratified by Congress. Act of March 3, 1891, 26 Stat. 989, 1029-30.

The Tribe also asserts that the disclaimer clause in the Idaho Constitution somehow vests the Tribe with title to the disputed submerged lands. The disclaimer clause, however, merely disclaims title to all lands "owned or held by any Indians or Indian tribes." Idaho. Const. art. 21, § 19. The clause does not act as an independent source of title to Indian lands, but simply recognizes the title vested in tribes pursuant to federal law.

by withdrawing lands for the use of Indian tribes? This issue has important implications, both for the immediate action and for state and federal relations in general. In the immediate action, the Ninth Circuit's decision establishes the threshold test that the Tribe must meet in order to prevail, and eases their burden of proof. More generally, the Ninth Circuit's decision, by recognizing presidential authority to abrogate the sovereignty guaranteed to the States under the equal footing doctrine, represents a substantial enlargement in the powers traditionally recognized to reside in the Executive. The State urges the Court to grant the petition for certiorari to hear this crucial issue.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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In The
Supreme Court of the United States

October Term, 1994

STATE OF IDAHO; PHIL BATT, Governor; PETE CENARRUSA,
Secretary of State; ALAN G. LANCE, Attorney General; J.D.
WILLIAMS, Controller; ANNE FOX, Superintendent of Public
Instruction; KEITH HIGGINSON, Director, Dept. of Water
Resources; each individually and in his official capacity;
IDAHO STATE BOARD OF LAND COMMISSIONERS; and
IDAHO STATE DEPARTMENT OF WATER RESOURCES,

v.

Petitioners,

COEUR D'ALENE TRIBE, in its own right and as the beneficially
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MARGARET JOSE, DOMNICK CURLEY, AL GARRICK, NORMA
PEONE and HENRY SIJOHN, individually, in their official capacity
and on behalf of all enrolled members of Coeur D'Alene Tribe,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

**BRIEF OF THE STATES OF CALIFORNIA, ALABAMA,
ALASKA, HAWAII, KANSAS, MICHIGAN, MINNESOTA,
MONTANA, OREGON, SOUTH DAKOTA, UTAH AND
WASHINGTON AS AMICI CURIAE
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

1. Should the doctrine of *Ex parte Young*, 209 U.S. 123 (1908) be expanded to permit judicial relief amounting to the adjudication of title, when such a case would otherwise be prohibited by the Eleventh Amendment?
2. Does the presumption against conveyances by the federal government of navigable waters held in trust for the future states apply to the establishment of reservations by an executive order totally lacking any indication of intent to convey title to such waters?

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INTEREST OF AMICI

The constitutional immunity of states from federal court jurisdiction in the absence of waiver or a consent "inherent in the constitutional plan" is basic to our federal system. The Court has already rejected efforts to exempt both Indian tribes and foreign nations from its broad scope. *Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578 (1991); *Monaco v. State of Mississippi*, 292 U.S. 313 (1934). Much of the efforts and analysis in a long history of Eleventh Amendment jurisprudences will have been in vain, however, if the simple device asserted below will suffice to confer jurisdiction nevertheless.

The potential scope of this case goes far beyond disputes between tribes and states. If the officers' suit, coupled with declaratory relief, is available as a means of evading the restrictions of the Eleventh Amendment on federal jurisdiction, little will remain of it, for any imaginative counsel will be able to characterize virtually every complaint as a continuing violation of federal law requiring declaratory and injunctive relief.

The issue will invariably arise in other cases, if it is not resolved now. Disputes between states and tribes over land titles and reservation boundaries – notably the issue of inclusion of navigable waters – have arisen with respect to three different tribes along the Colorado River, *Arizona v. California*, No. 8, Original. Presently, the Department of Interior recognizes 306 tribes in the lower 48 states and another 220 entities in Alaska, where native corporations claim over 44 million acres. Fifty two million acres of trust land are held by tribes and individual Indians. Wilkinson, *American Indians, Time and The Law*

8 (1987). Much of this land was withdrawn by presidential executive orders. Over 190 executive orders were issued establishing or modifying the boundaries of Indian reservations were issued prior to 1904. 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 801-936 (1904). After 1910, an additional 63 orders establishing reservations or adding acreage to existing ones were made by the executive branch. 3 Charles F. Wheatley, Jr., *Study of Withdrawals and Reservations of Public Domain Lands*, Public Land Law Review Commission C-6, C-7.

And the practice may well be carried beyond state-tribal disputes. Since the initial boundary between state navigable waters and the upland is determined by federal law, *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), virtually any riparian or littoral landowner might attempt to utilize the federal courts to try what is essentially a local real property dispute. The Ninth Circuit opinion, if left standing, will invite a flood of title litigation in the federal courts.

It is particularly disturbing that the decision below deals so blithely with disposition of the states' navigable waters – long characterized by this Court as an essential attribute of state sovereignty. The navigable waters come to the states as a constitutional entitlement, not a discretionary grant by Congress. *Oregon v. Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 374. These waters were held in trust for the future states by Congress, and once statehood takes place, are held in public trust by the states for their people. Just as their alienation by states is strictly limited, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), pre-statehood conveyances by Congress are not to be presumed, but must be made in clear and uncertain

terms. Where, as here, the claim of respondents rests on an ambiguous executive order unsupported by any such unequivocal expression by Congress, there is no basis for an action abrogating at once the Eleventh Amendment and the equal footing doctrine.

SUMMARY OF ARGUMENT

Where the goal of litigation is adjudication of title to land, the strictures imposed on federal jurisdiction by the Eleventh Amendment may not be evaded by filing an action for injunctive and declaratory relief. This Court has properly held in the context of federal law that an officers' suit may not be used in the place of a quiet title action. Other federal courts of appeal have held that actions involving claims of title to land must be resolved in the context of a quiet title action. Resolution of this question is necessary not only because of its importance, but because of the split of authority now extant.

Assuming that state officers may be restrained by a federal court from acting inconsistently with a title allegedly rooted in federal law, such an action will not lie where the State has a colorable claim. A federal district court may properly decide that no claim arises against the state solely by virtue of an executive order having the effect of encompassing navigable waters within a tribal reservation.

The presumption against the pre-statehood conveyances of navigable waters cannot be overcome in the absence of express and explicit congressional intent to make such a conveyance in order to carry out some

international duty or public exigency. Where, as here, the action at issue consists of an Executive Order unsupported by such an expression, the presumption cannot be overcome.

Failure to resolve this issue will result in different rules in different circuits. Already the First, Fifth and Seventh Circuits have indicated a varying interpretation of Eleventh Amendment principles in this context, and even several opinions from the Ninth Circuit diverge from the expansive decision at issue here. A constitutional rule rooted in federalism deserves a more consistent resolution.

STATEMENT OF THE CASE

This action arises from the efforts of an Indian tribe to quiet title to the beds, banks and waters of all the navigable waterbodies within its reservation – including Lake Coeur d'Alene – and to oust the State of Idaho of jurisdiction over them. Corollary to this goal, the tribe seeks to enjoin the State, its agencies and officials from taking any action inconsistent with its asserted title.

The State of Idaho moved to dismiss – challenging the jurisdiction of the federal district court on Eleventh Amendment grounds and at the same time asserting that the complaint failed to state a claim upon which relief may be granted. Although the district court granted the motion, *Coeur d'Alene Tribe of Idaho v. State of Idaho*, 798 F.Supp. 1443 (D. Ida. 1992), the Court of Appeals disagreed. It held, in effect, that notwithstanding the State's Eleventh Amendment immunity from federal jurisdiction

over the quiet title action, the state officers could be enjoined from asserting the very same title which the court was constitutionally prohibited from adjudicating. *Coeur d'Alene Tribe of Idaho v. State of Idaho*, 42 F.3d 1244 (9th Cir. 1994).

ARGUMENT

I

INTRODUCTION

Four years ago, this Court laid to rest the issue of state immunity from suit in federal court by Indian tribes. It firmly rejected the notion that the strictures of the Eleventh Amendment were inapplicable to such actions. *Blatchford v. Native Village of Noatak, supra*, 111 S.Ct. 2578 (1991). However, it left for another day whether the states' Eleventh Amendment immunity could be breached by an action for *injunctive* relief. *Id.* at 2586. Now another tribe seeks to take advantage of this question, and the majority of a Ninth Circuit panel has approved its argument that the federal courts may entertain in an officer's suit for injunction and declaration of rights what this Court has said they may not adjudicate in an action for substantive relief.

The issue is one of concern to all the amicus states represented herein, for the exception espoused by the Ninth Circuit threatens to swallow up the rule. If Eleventh Amendment immunity is to be anything more than the fading smile of a juridical Cheshire cat, it must be

applied by the Court in the context in which it is presented here.

II

THE ELEVENTH AMENDMENT PROHIBITS SUITS BY A TRIBE AGAINST A STATE. THE EXCEPTION FOR INJUNCTIVE RELIEF SET FORTH IN *EX PARTE YOUNG* IS INAPPLICABLE WHERE, AS HERE, THERE IS NO VIOLATION OF FEDERAL LAW

A. The "Officers' Suit" is Unavailable in the Absence of a Convincing Showing that Federal Law is Being Violated.

Under *Ex parte Young*, *supra* at 123, "officers' suits" for injunctive relief may be available against state officials even where the state on whose behalf they purport to act is immune. This exception to Eleventh Amendment immunity, however, is based on the doctrine of ultra vires, and must be construed narrowly. *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 99, 114, n. 25 (1984). A state officer acts ultra vires only when the action is taken "without any authority whatever." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982). Where, as here, the district court examined the record and found no violation of federal law, no basis exists for equitable jurisdiction.

"Officers' suits" are available against state officials only where their conduct is unauthorized or unconstitutional. *Ex parte Young*, *supra*. Where, as here, the district court examined the record and found no showing of federal law violation, no basis existed for enjoining state officials and agencies.

The district court's decision was well founded. The presumption against federal conveyance of navigable waters, held in trust for the future states, has been respected by this Court since its earliest days. *Pollard's Trustee v. Hagen*, 44 U.S. (3 How.) 212, 222 (1845). Pre-statehood grants have been made only under "the most unusual circumstances," *Utah Div. of State Lands v. U.S.*, 482 U.S. 193, 197 (1987), and only "international duty or public exigency" has compelled Congress to take such actions. *Shively v. Bowlby*, 152 U.S. 1, 48-50 (1894).

This rule has been applied expressly to Indian tribes. This Court has stated that such conveyances are "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

Furthermore, such a conveyance must leave no doubt that it was intended to "embrace the land under the waters of the stream." *Montana v. U.S.*, 450 U.S. 549, 552 (1981). Such an express intent on the part of Congress must exist to find that such lands have been reserved prior to statehood as well as granted. The presumption against a prestatehood grant or reservation can only be overcome if it is shown 1) that Congress clearly intended to include the submerged land within the reservation and 2) Congress affirmatively intended to defeat the future state's title to the submerged land. *Utah Div. of State Lands v. United States*, *supra* 482 U.S. at 193, 201-202; see Conference of Western Attorneys General, American Indian Law Deskbook 54-60 (1993).

In this case, the executive reservation on which the tribe relies merely included various of the state's navigable waters, including Lake Coeur d'Alene, within the reservation boundaries. Nothing in that action had the effect of conveying its beds, banks and waters to the tribe. Indeed, it is commonplace for state navigable waters to run through Indian reservations, and that fact has no effect on title to them. See United States' Response to the State Parties' Motion for Summary Judgment, Before the Special Master, *Arizona v. California*, *supra*.

B. The "Mutuality" Test Established by this Court is Not Met Here, Where States are Held Susceptible to Federal Suit but Tribes Are Not.

In *Blatchford v. Native Village of Noatak*, *supra*, 111 S.Ct. at 2582-2583, this Court observed that a controlling factor in finding a surrender of State sovereignty "inherent" in the plan of the constitutional convention is the element of mutuality. Thus suits by one state against another are permissible, but suits by Indian tribes cannot be presumed to have been countenanced in the plan of the convention because there was no mutual surrender of tribal sovereignty to the State. *Id.* at 2583. Here, if the State attempted to sue tribal officials, sovereign immunity would undoubtedly be raised as a defense. It cannot be assumed that the states contemplated such a one-way surrender of their own immunity.

III

THE DECISION BELOW TO ALL PRACTICAL EFFECTS PROVIDES A QUIET TITLE REMEDY IN FEDERAL COURT IN CONTRAVENTION OF THIS COURT'S NOATAK OPINION. ITS EFFECT IS TO DIMINISH STATE ASSETS AND INTERFERE WITH PUBLIC ADMINISTRATION

A. An Officers' Suit May Not Be Used as a Substitute for a Quiet Title Action.

A suit is against the sovereign if the judgment "would expend itself on the public treasury or domain, or interfere with the public administration." *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Since this principle stems from the sovereign immunity doctrine, decisions of this Court dealing with the federal government in like context are instructive. This Court held in *Block v. North Dakota*, 461 U.S. 273 (1983), that an officers' suit may not be used as a substitute for a federal quiet title action. Its reasoning is applicable here. In *Block*, this court expressly rejected the officer's suit as "a device for circumventing federal sovereign immunity." *Id.*, 461 U.S. at 281. In an opinion echoing *Ex parte Young* principles, this Court concluded that the officer's suit in an action affecting property will be available "only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.'" *Ibid.*, quoting *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 702 (1949). Here, no showing has been made that the defendant state officers and agencies are acting unconstitutionally or beyond their authority. There is no "unequivocal" expression on the part of Congress to

overturn the analagous Eleventh Amendment immunity of states. Cf. *Pennhurst State School & Hosp. v. Halderman*, *supra*, 465 U.S. at 99.

In hearings on the Federal Quiet Title Act, this Court concluded it had been the "predominant view" that citizens asserting title to or the right to possession of lands claimed by the United States were without judicial remedy because of the doctrine of sovereign immunity. *Block v. North Dakota*, *supra*, 461 U.S. at 282. A contrary construction, the Court observed, would render nugatory the careful scheme for adjudicating a quiet title action, and would permit institution of an unlimited number of stale claims because no statute of limitations would be applicable. *Id.* at 285.

In dealing with questions of sovereign immunity, the Court's reasoning applies equally well to the States as to the Federal Government. Waivers of sovereign immunity are to be strictly construed, whether with regard to states or the federal government. Cf. *Block v. North Dakota*, *supra*, 461 U.S. at 287; *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

B. The Opinions of Other Circuits Support the View That the Relief Sought Here is Equivalent of Quiet Title and Thus Precluded.

The decisions of other circuits are more consistent with Eleventh Amendment jurisprudence as this Court has enunciated it. In *John G. and Marie Stella Kennedy v. Mauro*, 21 F.3d 667 (5th Cir. 1994), boundary and title issues were similarly raised in an action for declaratory and injunctive relief against the Texas Commissioner of State Lands.

The court had no difficulty in finding that to provide the relief sought, an adjudication of title would be necessary. The action was accordingly dismissed. And in *Fitzgerald v. Unidentified Wr. & Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989), the court held that jurisdiction was lacking in an in rem action involving a submerged wreck when the relief sought was an injunction against government officers from interfering with the property. In *Toledo, Peoria & Co. Ry. Co. v. Illinois*, 744 F.2d 1296 (7th Cir. 1984), cert. den., 470 U.S. 1051 (1985), the court declined to entertain an action in which plaintiffs sought an order compelling state officials to restore possession of disputed property to the plaintiff.

Even courts in the Ninth Circuit have been less than in lockstep on this issue. In *Aguilar v. Kleppe*, 424 F.Supp. 433 (D. Alaska 1976), plaintiffs sought an order compelling the State to set aside certain selections of federal land. The court observed that the suit "if successful, will cause the State to lose land to which it has received patents from the United States," and therefore the *Ex parte Young* exception was inapplicable. See, also, *Harrison v. Hickel*, 6 F.3d 1347 (9th Cir. 1993); *Ullaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990) (action seeking restoration of trust land, though for injunction, seeks retrospective relief).

C. The Injunctive and Declaratory Relief Sought Here is Precluded by *Green v. Mansour*.

This Court held only 10 years ago that declaratory relief may not be awarded against a state official if the

judgment may have preclusive effect in subsequent proceedings for monetary relief. *Green v. Mansour*, 474 U.S. 64 (1985). This is consistent with the rationale that the Eleventh Amendment applies to its fullest extent if an adverse judgment must come from the state treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974). That rule is even more appropriate here where, rather than state funds, state public trust lands, acquired under the equal footing doctrine, are at stake. See *Ulaleo v. Paty*, *supra*, 902 F.2d 1395.

IV

THE RESPONDENTS HAVE FAILED TO MAKE A CLAIM ON WHICH DECLARATORY AND INJUNCTIVE RELIEF MAY BE BASED

To invoke the *Ex parte Young* doctrine, there must be a violation of federal law or constitutional rights. It is not sufficient that a claim be asserted: "To state a federal claim, it is not enough to invoke a constitutional provision or to come up with a catalogue of federal statutes allegedly implicated. Rather, as (this) Court has repeatedly admonished, it is necessary to state a claim that is substantial. . . . We do not have jurisdiction over a claim, no matter how federal it purports to be, that is 'patently without merit, or so insubstantial, improbable, or foreclosed by Supreme Court precedent so as not to involve a federal controversy.' *City of Las Vegas v. Clark County*, 755 F.2d 697, 701 (9th Cir. 1980) (quoting *Demarest v. U.S.*, 718 F.2d 964, 966 (9th Cir. 1983, cert. denied, 466 U.S. 950 (1984)," cited by Kozinski, J. dissenting in *Native Village of Noatak v. Hoffman*, 896 F.2d at 1166).

A. The Presumption Against Conveyance of the Lands is Unrebutted.

This Court has recognized what has been characterized as "the strongest presumption" that Congress will not act to convey sovereign lands rather than preserve them for the State. O'Connor, J., dissenting in *Block v. North Dakota*, *supra*, 461 U.S. at 299, citing *Montana v. United States*, *supra* at 544, 552 ("A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption in favor of State title.") The states' title to sovereign land comes from the Constitution itself, and does not depend on the largesse of Congress. *Oregon v. Corvallis Sand & Gravel Co.*, *supra* 363, 374. See *United States v. Oregon*, 295 U.S. 1, 14:

"Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce."

For those reasons, this Court has held that a conveyance of navigable water must not be inferred "unless the intention was definitively declared or otherwise made plain" *Montana v. United States*, *supra*, 450 U.S. at 552.

Here, nothing in the executive order at issue, which described part of the reservation boundary as extending to the center of the Spokane River, indicated an intention to overcome the strong presumption that these waters, held in trust for the State of Idaho, did not pass to the tribe. Nothing in the order or the statutory authority under which it issued "even approaches a grant of rights in lands underlying navigable waters . . ." or evinces a purpose "to depart from the established policy . . . of treating such lands as held for the benefit of the future state." *United States v. Holt State Bank*, *supra*, 270 U.S. at 58-59.

B. Only Congress May Convey Sovereign Lands; and Then "Because of 'Some International Duty or Public Exigency.'"

This Court reiterated its long established rule on the construction of alleged grants of equal footing lands in *Montana v. United States*, 450 U.S. 544, 551-552: "The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce . . ." One exception exists: Congress may sometimes convey lands below the high-water mark of a navigable water, "but because control over the property underlying navigable water is so strongly identified with the sovereign power of government (citation), it will not be held that the United States has conveyed the land except . . . because of 'some international duty or public exigency.'" (citation.) Furthermore, Congress' intention to convey the sovereign land must be "definitely declared or otherwise made

plain," *Id.*, (quoting *Holt State Bank*, 270 U.S. 49, 55) or rendered "in clear and especial words," (quoting *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 411) or 'unless the claim confirmed in terms embraces the land under the waters of the stream," (quoting *Packer v. Bird*, 137 U.S. 661, 672).

The alleged withdrawal here on its face met none of those requirements. There is no expression of congressional intent here to contravene the equal footing doctrine. Accordingly, the motion to dismiss was properly granted. The district court found, on the basis of an ambiguous executive order which was silent on the subject of sovereign lands that no conveyance had been made of the bed and banks of Lake Coeur d'Alene. Indeed, this Lake, and the other navigable waters wholly or partially within reservation boundaries, is merely one of any number of navigable waters, owned by the State under the constitutional equal footing doctrine, that happen to be within a reservation. Cf. *Montana v. U.S.*, *supra*, 450 U.S. 544 (Big Horn River); *United States v. Minnesota*, 270 U.S. 181 (1926) (swamp and overflow lands); *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983), cert. denied sub nom. *Colorado River Indian Tribes v. Aranson*, 464 U.S. 982 (1983) (Colorado River). Thus, as a matter of law, respondents failed to rebut the State's much more than colorable claim. Cf. *Florida Dept. of State v. Treasure Salvors, Inc.*, *supra*, 458 U.S. at 697.

CONCLUSION

As this Court concluded in *Block v. North Dakota*, in another context, the *Ex parte Young* doctrine simply does

not fit in the context of disputed titles. An injunction directing state officials and agencies from taking acts inconsistent with the plaintiff's title will amount to a quiet title adjudication, for it will result in effectively giving the plaintiff full use and control of the property. The tribe would be able to lease the bed of Lake Coeur d'Alene, free from constraints of state ownership and presumably free from the public trust constraints to which the state is subject. The State's treasury will be directly affected by its failure to administer and lease the beds and shoreline of the lake and rivers in question, and its public administration of an asset integral to its sovereignty gravely impaired. Should the State attempt to enjoin tribal officials from taking actions inimical to state law, the response is predictable. Tribal sovereign immunity would be raised by the plaintiff against any state efforts to adjudicate the propriety of its actions. The street should run both ways.

This Court's reasoning with respect to *federal* officer's suits is applicable here. Injunctive relief simply is not available against the actions of state officers within their statutory authority. For "[t]here are the strongest reasons of public policy for the rule that (injunctive) relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." *Larson v. Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 682, 704. This principle is applicable here, for the Eleventh Amendment immunity of states is rooted in principles of sovereign

immunity and federalism. *Pennhurst State School & Hosp. v. Halderman*, *supra*, 465 U.S. at 98.

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MAY 29 1996

CLERK

In The
Supreme Court of the United States

October Term, 1995

IDAHO, et al.,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, et al.,

Respondents.

— ♦ —
On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit
— ♦ —

JOINT APPENDIX
— ♦ —

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RELEVANT DOCKET ENTRIES

Federal District Court, District of Idaho

- 10/15/91 COMPLAINT (Summons(es) issued) (consent notice issued/furnished (jb) [Entry dated 10/22/91]
- 11/13/91 MOTION by defendants to dismiss (jb) [Entry date 11/14/91]
- 11/13/91 MEMORANDUM by defendants in support of motion to dismiss [3-1] (jb) [Entry date 11/14/91]
- 2/21/92 BRIEF by plaintiffs in opposition re: motion to dismiss [3-1] (jb)
- 3/6/92 REPLY brief by defendants in support of motion to dismiss [3-1] (jb) [Entry date 03/09/92]
- 7/20/92 ORDER by Honorable Harold L. Ryan granting dft's motion to dismiss [3-1]; all claims brought by pla are dismissed (cc: all counsel) (jb) [Entry date 07/29/92]
- 7/29/92 JUDGMENT by Honorable Harold L. Ryan: that plas take nothing against dfts; dismissing case Book: 37 Page: 75 (cc: all counsel) (jb)
- 8/14/92 NOTICE OF APPEAL by plaintiff Coeur d'Alene Tribe, plaintiff Ernest Stensgar, plaintiff Lawrence Aripa, plaintiff Margaret Jose, plaintiff Domnic Curley, plaintiff Al Garrick, plaintiff Norma Peone, plaintiff Henry Sijohn from Dist. Court decision [18-2] (cd) [Entry date 09/09/92]

United States Court of Appeals for the Ninth Circuit

- 12/9/94 OPINION by Circuit Judges E. Wright, T. Reaveley (5th Cir.), and E. Leavy
-

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE)
 OWNERSHIP OF THE BEDS)
 AND BANKS AND ALL)
 WATERS OF ALL NAVIGABLE)
 WATER COURSES WITHIN)
 THE 1873 COEUR D'ALENE)
 RESERVATION BOUNDARY)
)

COEUR D'ALENE TRIBE OF)
 IDAHO, in its own right and as)
 the beneficially interested party)
 subject to the trusteeship of the)
 UNITED STATES OF AMERICA;)
 ERNEST L. STENSGAR,)
 LAWRENCE ARIPIA,)
 MARGARET JOSE', DOMNICK)
 CURLEY, AL GARRICK,)
 NORMA PEONE and HENRY)
 SIJOHN, individually, in their)
 official capacity and on behalf)

of all enrolled members of the) CASE NO.
 COEUR D'ALENE TRIBE OF) CIV91-0437-N-HLR
 IDAHO,)
 Plaintiffs,) BRIEF IN SUPPORT
 vs.) OF MOTION TO
) DISMISS
 STATE OF IDAHO; CECIL D.)
 ANDRUS, GOVERNOR; PETE)
 CENARRUSA, SECRETARY OF) (13) QUIET TITLE
 STATE; LARRY ECHOHAWK,) (9) CIVIL RIGHTS
 ATTORNEY GENERAL; J.D.)
 WILLIAMS, AUDITOR; JERRY)
 EVANS, SUPERINTENDENT OF) (Filed
 PUBLIC INSTRUCTION; KEITH) Nov. 13, 1991)
 HIGGINSON, DIRECTOR, DEPT.)
 OF WATER RESOURCES; each)
 individually and in his official)
 capacity; IDAHO STATE)
 BOARD OF LAND)
 COMMISSIONERS; and IDAHO)
 STATE DEPARTMENT OF)
 WATER RESOURCES;)
 Defendants.)

I. NATURE OF ISSUES PRESENTED

The Coeur d'Alene Tribe¹ claims ownership of all waters and the beds and banks of all navigable waters within the area withdrawn from sale and set apart for the

¹ Although the complaint names as plaintiffs individual tribal members in addition to the Coeur D'Alene Tribe, for purposes of convenience the plaintiffs will be collectively referred to as the Coeur d'Alene Tribe.

Coeur d'Alene Tribe [hereinafter Tribe] by order of President Ulysses S. Grant on November 8, 1873.² The Tribe's claims raise serious questions not only of ownership, but of state sovereignty and the division of authority between state, tribal and national governments.

Idaho holds sovereign title to all lands underlying navigable waters³ within the state. The state's title is based on the equal footing doctrine. This doctrine was described by the Supreme Court in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), as follows:

The equal footing doctrine is deeply rooted in history, and the proper application of the doctrine requires an understanding of its origins. Under English common law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such lands was

² The area withdrawn by the 1873 Executive Order is shown in Exhibit 1. In 1887, the Tribe entered into an agreement with the United States whereby the Tribe ceded to the United States all lands outside the 1873 withdrawal. In 1889, the Tribe entered into a second agreement with the United States, in which it ceded a large portion of the lands set aside by the 1873 Executive Order. Neither the 1887 nor the 1889 Agreement was ratified until March 3, 1891. See 26 Stat. 1027, I Kappler, *Indian Affairs: Laws and Treaties* 419 (2d ed. 1904). Three years later, the Tribe ceded a small portion of the Reservation created by the 1891 statute to allow establishment of the Harrison townsite. See 28 Stat. 322, I Kappler 531. The 1873 Executive Order is attached to this memorandum as Exhibit 2, the 1891 statute is attached as Exhibit 3, and the 1894 agreement is attached as Exhibit 4.

³ Such lands are commonly referred to by various terms, including "beds of navigable waters," "beds and banks of navigable waters," "bedlands," "submerged lands," or "sovereign lands."

important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people. When the 13 Colonies became independent from Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown. Because all subsequently admitted States enter the Union on an "equal footing" with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union.

Id. at 196.

Title to the lands under navigable waters vests automatically in the state upon admission to the Union; no congressional action is necessary since the state's title is "conferred . . . by the Constitution itself." *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

When the United States acquired the western territories during the nineteenth century, it held the sovereign submerged lands within those territories in trust for the future states. Although Congress had authority under the property clause to convey sovereign lands to private parties prior to statehood, the policy of the United States was to make such conveyances only in the event of "some international duty or public exigency," since such lands are "so strongly identified with the sovereign power of government." *Montana v. United States*, 450 U.S. 544, 552 (1981), quoting *United States v. Holt State Bank*, 270 U.S.

49, 55 (1926). Congressional conveyances must take place prior to the date of statehood, however, because once title is vested in the state it cannot be conveyed to private parties by Congress. *Shively v. Bowlby*, 152 U.S. 1, 27 (1894).

A court faced with a question of title to the beds of navigable waters must "begin with a strong presumption against conveyance by the United States." *Montana*, 450 U.S. at 552. The presumption can be overcome only if Congress' intention to convey the lands to a private party was "definitely declared or otherwise made plain," was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream." *Id.* The barriers faced by private parties seeking to establish title to submerged lands are so daunting that in a recent review of its equal footing cases, the Court noted that in "only a single case . . . have we concluded that Congress intended to grant sovereign lands to a private party." *Utah Division of State Lands v. United States*, 482 U.S. 193, 198 (1987).

The Coeur d'Alene Tribe's claims that the United States decided to deprive the future State of Idaho of its equal footing entitlement to certain sovereign lands and instead vest ownership of such lands in the Coeur d'Alene Tribe runs counter to the presumption of state ownership under the equal footing doctrine. The Tribe's claims strike at the core of the state's sovereignty. The state has exercised unquestioned jurisdiction over the disputed lands and waters since at least 1927, when the legislature enacted statutes dedicating the waters of Lake Coeur d'Alene and the lands underlying those waters to public use. Idaho Code §§ 67-4304 and 67-4305. Since that

time, thousands of people have established homes and businesses on the shores of Lake Coeur d'Alene, with the expectation that the state would always hold the lake and the lands beneath it in trust for the benefit of the general public. A change in ownership at this late date, more than one hundred years after statehood, would have tremendous implications for the general public, as well as the state.

II. THE ELEVENTH AMENDMENT BARS FEDERAL COURTS FROM HEARING QUIET TITLE ACTIONS OR ISSUING INJUNCTIVE OR OTHER RELIEF AGAINST STATES AND STATE AGENCIES.

The Eleventh Amendment to the United States Constitution provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The Supreme Court has construed the Amendment to also bar suits brought by a citizen against his own state. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984).

The Eleventh Amendment bars this Court from hearing the Tribe's quiet title claims against the state. The present action is analogous to *Skokomish Indian Tribe v. France*, 269 F.2d 555 (1959), in which an Indian tribe named the State of Washington as a defendant in an action to quiet title to tidelands. The Ninth Circuit ordered the district court to dismiss the action against the state due to Eleventh Amendment immunity. *Id.* at

562-63; see also *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682 (1982) (holding that federal courts do not have jurisdiction to adjudicate a state's interest in property without the state's consent).

The Eleventh Amendment also bars the Tribe from seeking declaratory or injunctive relief against the state. "Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State." *Missouri v. Fiske*, 290 U.S. 18, 27 (1933).

The immunity from suit granted states by the Eleventh Amendment also extends to state agencies and departments, regardless of the type of relief sought. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984); *Almond Hill School v. United States Dept. of Agriculture*, 768 F.2d 1030, 1034-35 (9th Cir. 1985). It cannot be reasonably disputed that the State Board of Land Commissioners and the Department of Water Resources are agencies or departments of the State of Idaho, since each exercises essential governmental functions. The State Land Board is a constitutional body empowered to direct, control, and dispose of the public lands of the state. Idaho Const. art. 9, § 7. The Department of Water Resources is specifically designated as an "executive department of the state government," Idaho Code § 42-1701, and regulates the appropriation and distribution of the state's waters. See Idaho Code title 42, chap. 17; see also *Union Pac. R.R. v. Idaho*, 654 F. Supp. 1236, 1240 (D. Idaho 1987) (Dept. of Water Resources shares State's Eleventh Amendment immunity). Thus, the Tribe's claims against

the State of Idaho, the Idaho State Board of Land Commissioners, and the Department of Water Resources are proscribed by the Eleventh Amendment and must be dismissed.

III. THE TRIBE'S ACTIONS AGAINST THE INDIVIDUAL STATE OFFICERS MUST BE DISMISSED AS BARRED BY THE ELEVENTH AMENDMENT AND FOR FAILURE TO STATE A CLAIM.

1. The Eleventh Amendment strictly limits the actions that may be maintained against state officers.

The Eleventh Amendment bars suits against state officials when sued in their official capacity, since such suits are only another way of pleading an action against the state whom the officer represents. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). The only exception is that state officials may be sued for prospective relief, and then only to enjoin unconstitutional actions by state officials. Such actions may proceed because an official acting in violation of the Constitution is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. 123, 160 (1908). Such suits do not violate the Eleventh Amendment because "the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and which does not affect, the state in its sovereign or governmental capacity." *Id.* at 159.

As an exception to the constitutional protections of the Eleventh Amendment, the *Ex parte Young* exception is not broadly applied. See *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102 (1984). Thus, the mere fact that a suit prays for prospective relief does not automatically avoid Eleventh Amendment limitations: "Simply asking for injunctive relief and not damages *does not* clear the path for a suit." *Ulaleo v. Paty*, 902 F.2d 1395, 1399 (9th Cir. 1990) (emphasis in original). The reviewing court must "look to the substance rather than to the form of the relief sought," and "be guided by the policies underlying the decision in *Ex parte Young*." *Papasan v. Allain*, 478 U.S. 265, 279 (1986). If examination reveals that "the state is the real, substantial party in interest," or if "the decree would operate against [the state]," the suit must be dismissed. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984), quoting *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 464 (1945), and *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam). This bar applies "regardless of whether [the plaintiff] seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 101.

a. Quiet title suits against state officers are barred by the Eleventh Amendment since such actions affect ownership of state property.

The Coeur d'Alene Tribe's quiet title action does not come within the rule of *Ex parte Young* because quiet title suits against state officers directly impact state property and are thus barred by the Eleventh Amendment. In *Aquilar v. Kleppe*, 424 F. Supp. 433, 436-37 (D. Alaska

1976), the United States District Court for Alaska concluded that the Eleventh Amendment barred an action against the Governor and Commissioner of Natural Resources (sued in their official capacities) to quiet a Native Alaskan's claims to lands patented to Alaska by the United States. The court stated:

Plaintiffs seek to fit this case within the exception to the eleventh amendment that allows suits for prospective injunctive relief under 28 U.S.C. § 1343. The plaintiffs' characterization cannot be accepted. . . .

This suit, if successful, will cause the State to lose land to which it has received patents from the United States. This form of relief is similar to the "equitable restitution" which was specifically found barred by the eleventh amendment in *Edelman v. Jordan*, 415 U.S. 651, 668-69, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The court can find no distinction of significance in the fact that it is land that is involved here rather than money.

Aquilar v. Kleppe, 424 F. Supp. at 436-37.

The *Aquilar* decision was followed in *Red Lake Band of Chippewa Indians v. City of Baudette*, 769 F. Supp. 1069 (D. Minn. 1991), a suit brought, in part, to remove a cloud on title caused by a highway easement held by the State of Minnesota. In deciding a motion to dismiss the tribe's action against the state, the court addressed the issue of whether a quiet title action was more akin to prospective relief to enjoin unconstitutional conduct or retrospective relief. After describing the holding in *Aquilar*, the court stated:

The Court agrees with the reasoning in *Aquilar*. This case does not fall within the exception for prospective equitable relief set forth in *Edelman* and *Ex parte Young*. Accordingly, the motion of the State of Minnesota to dismiss the case against it will be granted.⁴

769 F. Supp. at 1073.

In the case of *Toledo, Peoria & Western R.R. v. Illinois*, 744 F.2d 1296 (7th Cir. 1984), cert. denied, 470 U.S. 1051 (1985), the Seventh Circuit Court of Appeals held that a suit against state officials to remove a cloud on title caused by a state highway easement would directly impact the state and was thus barred by the Eleventh Amendment. The court reasoned that:

[T]he relief here requested by plaintiff ordering the state to release its interest in real property is fundamentally different from the "prospective" relief of *Quern* [*v. Jordan*, 440 U.S. 332 (1979)](ordering state officials to send class members explanatory notice of state administrative procedures) and *Edelman* (ordering state officials to conform their future conduct to federal statutes), and more similar to "retroactive" relief - money damages - barred by *Edelman*."

Toledo, Peoria & Western R.R. v. Illinois, 744 F.2d 1296, 1299 n.1 (7th Cir. 1984).

An analogous line of cases is found in state courts, which overwhelmingly hold that quiet title suits against

⁴ Although the suit was against the state as a named party, the court apparently proceeded upon the assumption that prospective relief was available to the plaintiffs under *Ex parte Young*.

state officers are, in reality, suits against the state and therefore cannot be maintained without the state's consent. See, e.g., *Hjorth Royalty Co. v. Trustees of University*, 30 Wyo. 309, 222 P. 9, 11 (1924); *West Park Shopping Center, Inc. v. Masheter*, 216 N.E.2d 761, 763-64 (Ohio 1966); *American Trust and Savings Bank of Albuquerque v. Scobee*, 29 N.M. 436, 224 P. 788, 790 (1924). Since these cases were decided on the basis of common law sovereign immunity, which is narrower than Eleventh Amendment immunity, See *Aquilar*, 424 F. Supp. at 436, it is clear that the Eleventh Amendment must also bar quiet title actions against state officers.

The arguments for holding that quiet title actions cannot be maintained against state officers are especially compelling when applied to lands held in sovereign ownership by state governments. Claims to submerged lands implicate not only state ownership interests but also the sovereign powers of the state. If this Court sustains the Tribe's quiet title action against the state officers in their official capacities, it would, in effect, be equivalent to allowing the Tribe to proceed against the state in its sovereign capacity, a result prohibited by the Eleventh Amendment.⁵

⁵ Unlike title to submerged lands, which is held in the name of the State of Idaho, Idaho Code § 67-4305, the governor holds the disputed Lake Coeur d'Alene water right. Idaho Code § 67-4304. Nonetheless, any decree voiding or otherwise limiting the water right held by the governor would operate against the state, since the governor holds the right in his official capacity as an agent of the State of Idaho.

- b. The Tribe's suit for injunctive relief against state officers is also barred by the Eleventh Amendment because it is functionally equivalent to a suit against the state.

In addition to its quiet title claim, the Coeur d'Alene Tribe seeks injunctive relief against the individual state officers, both individually and in their official capacities. This action must fail for the same reasons that its quiet title claims must fail: the claim does not withstand Eleventh Amendment scrutiny, because the relief sought would directly affect the state in its sovereign capacity, regardless of the capacity in which the officers are sued.

This Court has consistently rejected any suggestion that suits against individual state officers are per se allowable under the Eleventh Amendment, and instead has insisted on determining the practical effect of the requested relief upon the state. *See, e.g., Mazur v. Hymas*, 678 F. Supp. 1473, 1477 (D. Idaho 1987); *Union Pacific R.R. v. Idaho*, 654 F. Supp. 1236, 1240 (D. Idaho 1987). Although the Tribe's suit does not seek damages, as was the case in *Mazur* and *Union Pacific*, the state submits that there is "no distinction of significance in the fact that it is land that is involved here rather than money." *Aquilar v. Kleppe*, 424 F. Supp. 433, 437 (D. Alaska 1976). If the requested relief would have the effect of divesting the state of possession and ownership of property, it cannot be sustained under the Eleventh Amendment.

Examination of the relief requested by the Tribe reveals that it would indeed have a substantial practical effect upon the State of Idaho. The Tribe asks the Court to:

Preliminarily and permanently enjoin defendants from regulating, permitting or taking any action in violation of the plaintiffs' rights of *exclusive use and occupancy, quiet enjoyment and other ownership interest* in the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary.

Complaint at 9 (emphasis added). If the requested relief were granted, it would effectively oust state officers from possession and control of the state's sovereign property, and would vest the tribal government with exclusive control of the disputed lands and waters.⁶ The intrusion upon state sovereignty cannot be questioned, since the state would effectively be enjoined from exercising any physical control over, or reaping any benefit from, the disputed properties.

The fact that injunctive relief, by itself, would not affect the state's legal title to the disputed lands and waters does not avoid the Eleventh Amendment's limitations on the federal judicial power. Control of the beds and banks of navigable waters is an essential attribute of the state's sovereign title to such lands. Indeed, the equal footing doctrine arose from the sovereign's need to control "navigation, fishing, and other commercial activity on rivers and lakes." *Utah Division of State Lands v. United*

⁶ The Tribe's complaint does not allege that regulation by state officers has interfered with the exercise of whatever usufructuary rights individual tribal members may have to the lands and waters within the 1873 Reservation. Instead, the violation alleged by the Tribe is the mere fact that the state deems to regulate the lands and waters in question, demonstrating that the central issue in this action is one of title, not of state violation of individual rights.

States, 482 U.S. 193, 196 (1987). Thus, removal of the state's ability to control such activities by enjoining its officers is tantamount to divesting the state of its sovereign title to the disputed lands and waters. The state could no longer protect or promote its concerns that such lands and waters remain available for all members of the public. The Eleventh Amendment's limitations on federal judicial powers prohibit such infringements upon state sovereign powers.

2. **Assuming arguendo that the Tribe's action to quiet title does not violate the Eleventh Amendment, the action cannot be sustained against individual state officers since they hold no title or interest in the disputed properties.**

Even if this Court concludes that the Eleventh Amendment does not bar the Tribe's quiet title action against the state officers in their individual and official capacities, the claim must be dismissed for failure to state a claim upon which relief can be granted. Courts faced with quiet title actions against government officers have concluded that such suits cannot be sustained in federal court since the individual officers have no title, claim, or interest in the disputed lands.

In *Chandler v. Dix*, 194 U.S. 590 (1904), the plaintiff sought to remove a cloud on title caused by a state's allegedly unconstitutional sale of plaintiff's lands for violation of tax laws. The state had purchased the lands at the tax sales and was in possession of the lands at the time of suit. The Court upheld dismissal of the case against the state auditor general and county treasurer,

stating: "The auditor general and county treasurer claim no interest in the land, and have none in the question whether the state's title is good. The state's title, so far as it appears, is the only one assailed. The state, therefore, is a necessary party and as this suit cannot be maintained against a state, the bill . . . must be dismissed." *Id.* at 591.

Another example is *Wood v. Phillips*, 50 F.2d 714 (4th Cir. 1931). The plaintiff attempted to bring a quiet title action against a federal forest supervisor on the basis that the supervisor exercised dominion and control over government forest lands. The court held:

When the bill is considered in the light of the principles governing suits in equity in the federal courts, . . . it is perfectly clear that it cannot be sustained for two reasons: (1) Because a bill to quiet title does not lie in favor of a plaintiff who is not in possession against a defendant who is in possession; and (2) because a suit to quiet title would settle nothing, as defendant is claiming, not in his own right, but as an officer of the federal government, which cannot be made a party.

A federal court of equity will not entertain a bill to quiet title by a plaintiff not in possession against a defendant in possession not only because such plaintiff has a plain, adequate and complete remedy at law in an action of ejectment, but also because defendant has the constitutional right to have the issue of title tried by a jury.

. . . .

And we think that the second ground stated above is equally conclusive against the right of

plaintiff to maintain the suit in equity. The United States not having consented to be sued, cannot be made a party defendant. . . . Consequently, plaintiff's suit to quiet title will not establish title against the adverse claimant, and any relief which the court may grant will be nugatory.

Id. at 716-17.

The early case of *Sanders v. Saxton*, 182 N.Y. 477, 75 N.E. 529 (N.Y. 1905), summarizes why actions to quiet title cannot be maintained against state officers:

Now, as the only object and purpose of a suit in equity to remove a cloud on the title to property is to have any adverse title that may be asserted under such cloud passed on and adjudged void, so that the plaintiff in possession may be forever afterwards free from any danger of the hostile claim, it would seem plain that, where the judgment in an action cannot conclude or bind a party claiming under the adverse title, the action must fail.

Id. at 530.

Since the State of Idaho is an indispensable party to such proceedings and has not consented to the suit, the Tribe's quiet title suit cannot proceed against the state officers alone. Title to the submerged lands is held by the State of Idaho, not the individual officers. See Idaho Code § 67-4305. It is well settled that in a suit to remove a cloud or quiet title the adverse claimant is a necessary party to the suit, and if relief were granted against government officers, it "would amount to nothing." *Appalachian Electric Power Co. v. Smith*, 67 F.2d 451, 456 (4th Cir. 1933), *cert. denied*, 291 U.S. 674 (1934). Thus, any declaration of

title in this action would not be binding upon the State of Idaho, the Idaho State Board of Land Commissioners, or the Idaho Department of Water Resources.⁷

IV. THE TRIBE'S ACTION FOR DECLARATORY JUDGMENT MUST BE DISMISSED SINCE IT IS FUNCTIONALLY EQUIVALENT TO A QUIET TITLE ACTION.

The Tribe's claim for a declaratory judgment regarding its alleged right to exclusively use and occupy waters and submerged lands, and seeking invalidation of state laws affecting those properties, must be dismissed, since it is functionally equivalent to its quiet title claims. The fact that the claim is framed as one for declaratory relief is irrelevant, because the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, does not create an independent jurisdictional basis for actions in federal court, but merely provides an additional remedy in suits otherwise within the court's jurisdiction. *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1382-83 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Marathon Oil Co. v. United States*, 807 F.2d 759, 763 (9th Cir. 1986), *cert. denied*, 480 U.S. 940 (1987). Thus, the Tribe's action for a declaratory judgment against the State of Idaho, the Idaho State Board of Land Commissioners, the Idaho

⁷ This reasoning also applies to the waters claimed by the Tribe. Although the governor holds the water right for the disputed waters, Idaho Code § 67-4304, they are held in his official capacity as an agent for the State of Idaho and title to such waters cannot be affected by suits against the governor in his individual capacity.

Department of Water Resources, and the state officers named in Tribe's complaint must be dismissed for the same reasons stated in the prior sections of this memorandum.

V. THE PLAINTIFFS' ACTION IS NOT SUSTAINABLE UNDER 42 U.S.C. § 1983.

The Tribe's action under 42 U.S.C. § 1983 is barred by the Eleventh Amendment, for the reasons discussed in the previous sections of this brief. Section 1983 does not abrogate the Eleventh Amendment immunity of the states. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66-67 (1989).

Even assuming *arguendo* that portions of the Tribe's action are not barred by the Eleventh Amendment, the Tribe's action cannot be sustained as a civil rights action under 42 U.S.C. § 1983.⁸ Section 1983 authorizes suits to be brought only by a "citizen of the United States or other person." A governmental unit suing to enforce rights allegedly held by the governmental unit is not eligible to bring an action under § 1983. *See Buda v. Saxbe*, 406 F. Supp. 399, 403 (E.D. Tenn. 1974) (state cannot bring § 1983

⁸ Section 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

action); *see also White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n.16 (9th Cir. 1987) (Fletcher, J., dissenting) (expressing doubt that a tribe qua sovereign would qualify as a "citizen of the United States or other person" eligible to bring an action under § 1983). Therefore, the Coeur d'Alene Tribe may not maintain an action under § 1983.

The state recognizes that the other plaintiffs named in the Tribe's complaint are persons for purposes of § 1983. The state submits, however, that the plaintiffs have failed to state a cause of action cognizable under § 1983. An examination of the complaint reveals that the plaintiffs plead two causes of action based on two alleged sources of title: aboriginal or Indian title and the 1873 Executive Order. An examination of these two claims reveals that they fall well outside the scope of § 1983.

1. Claims based on aboriginal or Indian title are outside the scope of § 1983.

The first count of the complaint seeks a judgment that the Coeur d'Alene Tribe possessed aboriginal title to the disputed lands and waters and that such title has never been extinguished.⁹ This cause of action cannot be sustained, because aboriginal title is not within the scope

⁹ Aboriginal or Indian title derives from tribal occupation of homelands since time immemorial. *See Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945). It is a right of use and occupancy, as opposed to fee title, which vested in the European nations that "discovered" the American continent. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572-84 (1823).

of § 1983, which is limited to claims of "deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ." In *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661-62 (9th Cir. 1989), the Ninth Circuit Court of Appeals stated:

The district court held that the tribe's right of self-government "preceded, and therefore is not secured by, any federal statute or the Constitution . . . and therefore is not cognizable under section 1983."

. . . .

The tribal right of self-government is not grounded specifically in the Constitution or federal statutes. See E. Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 Hastings L. J. 189, 90-93 "The tribes do not have a constitutional right to maintain this [sovereign] status, nor do they have a constitutional right to exercise any powers or attributes of sovereignty." *Id.* at 135. Instead, the right to tribal self-government is protected by treaty and federal judicial decisions. *Id.* at 91-93. "[T]he Constitution does not require continuing recognition of tribes as governmental entities [and] the treaty clause has come to be the source of federal legislative power over Indian affairs." *Id.* at 93. . . .

Id. at 661-62, cert. denied, 110 S. Ct. 1523, 108 L.Ed.2d 763 (1990).

Like the tribal right of self government, any aboriginal title the Coeur d'Alene Tribe may possess preexisted the formation of the federal government and is not dependent upon statute or formal governmental action. See *Cramer v. United States*, 261 U.S. 219, 229 (1923). Thus,

the Tribe's claims of aboriginal title are not "secured by the Constitution or laws" and fall outside the express scope of § 1983.

2. Claims based on Executive Orders are outside the scope of § 1983.

The second count of the Tribe's complaint seeks a judgment that the United States reserved or conveyed the disputed lands and waters to the Coeur d'Alene Tribe. This cause of action is based primarily on the 1873 Executive Order. The term "laws," however, as used in § 1983, has been extended only to statutory laws. See *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 110 S. Ct. 444, 448, 107 L.Ed.2d 420, 427 (1989). Executive orders are not "laws" and cannot affect or confer rights and obligations, since the power to do so is vested only in the Congress. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-04 (1979). Indeed, rights alleged under Executive Orders are not judicially-enforceable unless the Order was "issued pursuant to a statutory mandate or delegation of authority from Congress." *National Indian Youth Council v. Andrus*, 501 F. Supp. 649, 679 (D. N.M. 1980), quoting *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235 (8th Cir. 1975). See also *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457, 501 (D. Kansas 1978).

Moreover, it is well-established that an Executive Order establishing an Indian reservation creates no right of use or occupancy to the beneficiaries beyond the pleasure of Congress and the President. *Healing v. Jones*, 210 F. Supp. 125, 138 (D. Az. 1962), *aff'd per curiam*, 373 U.S. 758 (1963). Equitable title or other justiciable property rights

do not "vest" in the Tribe until such time as Congress conveys such rights to the Tribe through statute or ratification of treaty or agreement. *Healing v. Jones*, 174 F. Supp. 211, 216 (D. Az. 1959). Thus, tribal property claims based on Executive Orders are not "amenable to judicial determination." *Id.* Since the 1873 Executive Order was issued under the president's inherent authority, claims based on it are not within the scope of § 1983.

3. The complaint fails to plead the existence of any statutory rights, privileges, or immunities within the scope of § 1983.

The Tribe's claims to the disputed lands and waters are based on aboriginal title and the 1873 Executive Order. The Tribe does not allege that 1887 Agreement, the 1889 Agreement, or the 1891 act ratifying the agreements reserved or conveyed the disputed lands and waters to the Tribe.¹⁰ The only claims alleged to be secured by the agreements or the 1891 act are the following: in paragraph 20 of its complaint, the Tribe alleges that the 1887 Agreement provides that the "area within the Reservation was to be held for the Coeur d'Alenes and other Indians and used by others only with the consent of the Indians

¹⁰ The Tribe has good reason not to claim that the ratifying act conveyed title of submerged lands to the Tribe. The ratifying act was not enacted until March 3, 1891, eight months after the State of Idaho was admitted into the Union and acquired sovereign ownership of the beds and banks of all navigable waterways within its boundaries. It is well-established that Congress cannot convey submerged lands to private parties after the date of statehood. *Shively v. Bowlby*, 152 U.S. 1, 27 (1894).

on the Reservation;" in paragraph 21, it alleges that the cession agreement in the 1889 Agreement "did not cede any of the beds, banks or waters at issue herein." Such statutory claims are not cognizable under § 1983.

The Supreme Court has limited § 1983 remedies to statutes intended to create enforceable "rights, privileges or immunities" within the meaning of § 1983. *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 19 (1981). Accordingly, the Ninth Circuit Court of Appeals has, in several cases, examined whether suits brought by Indian tribes seeking interpretation of treaties and agreements come within the scope of § 1983. It has consistently concluded that they do not.

The primary case is *United States v. Washington*, 813 F.2d 1020 (9th Cir. 1987). There, the court was faced with the issue of whether a suit seeking interpretation of fish-sharing provisions in the tribe's treaty was within the scope of § 1983. The issue arose after the tribe had prevailed in its writ of certiorari to the Supreme Court by proving the existence of such rights, and was therefore seeking attorney fees under 42 U.S.C. § 1988. The court stated:

The dispositive question in this appeal is whether the Tribes have stated a claim under 42 U.S.C. § 1983 for which attorney's fees are available under 42 U.S.C. § 1988. This is answered by examining the character of the principal question that came before the Supreme Court in [*Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979)].

There is no doubt that the Supreme Court considered the principal question to be the 'character of th[e] treaty right to take fish.' *Fishing Vessel*, 443 U.S. at 662, 99 S.Ct. at 3062 (emphasis added). Indeed, the Supreme Court noted that the litigation commenced when the United States brought suit against Washington seeking an "interpretation of the treaties" and an injunction. *Id.* at 670, 99 S.Ct. at 3066 (emphasis added).

It is apparent that throughout the opinion the Supreme Court was making a determination of what exact rights each party had to the fish. As the Court stated, it granted certiorari "to interpret this important treaty provision." *Id.* at 674, 99 S.Ct. at 3068. There was no discussion of the state violating the Indians' rights under the treaty or under the Fourteenth Amendment. It is not disputed that the Indians had rights under the treaty. Just exactly what those rights were was unknown until the Supreme Court decision. If the State of Washington violates those now known and well-delineated rights, there would be an actual conflict between state and federal law which might give rise to a § 1983 action. That, however, has not yet happened and is not the situation here.

We therefore hold that the Tribe's *treaty interpretation claims do not give rise to a claim cognizable under § 1983.*

United States v. Washington, 813 F.2d at 1022-23 (citations and footnotes omitted) (underlined emphasis added); See also *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 663 (9th Cir. 1989) (§ 1983 does not apply to rights "grounded in

treaties, as opposed to specific federal statutes or the Constitution").

In another case, *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1984), the Ninth Circuit refused to extend § 1983 to cases where the issue is the division of sovereign powers between state, tribal, and national governments. Since the central issue in the suit was whether an Indian tribe was exempt from state taxation, the court held that the suit "does not implicate individual rights; rather the exemption derives from [the Tribe's] status as a sovereign." *Id.* at 851. The court concluded that since § 1983 is intended to protect *individual* rights, cases which revolve around divisions of governmental authority are not within its scope. *Id.*

The court reiterated its reasoning in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989):

Like the right to be free from state taxes preempted by federal law, the right to self-government is best characterized as a power, rather than a right. It enables a tribe to exercise powers as a sovereign. . . . Because the right to tribal government protects the powers conferred upon the tribe, and not individual rights, it falls outside the scope of § 1983.

Id. at 662. Thus, as a general rule, suits seeking to protect the exercise of tribal governmental powers cannot be brought under § 1983.

Based on the above cases, it is clear that the Coeur d'Alene Tribe's present action cannot be sustained under § 1983. To the extent the Tribe's claims are based on the 1887 and 1889 Agreements, the central issue will be one

of interpretation, not of protection of individual rights. Furthermore, the central issue in this case is whether the United States passed sovereign properties to the state, as presumed under the equal footing doctrine, or whether it conveyed the properties to the Tribe prior to statehood. The question is one of a division of sovereign authority and ownership between governmental bodies, not one of individual rights. Finally, even assuming for purposes of argument that the Tribe owns the disputed lands and waters, it owns them as a governmental entity; the members of the Tribe cannot assert individual rights of ownership to the lands and waters. Thus, since the suit seeks to protect rights "conferred upon the tribe, and not individual rights, it falls outside the scope of § 1983." *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir. 1989).

VI. CONCLUSION

For the reasons stated in this memorandum, the defendants submit that the Coeur d'Alene Tribe's action against the State of Idaho, the State Board of Land Commissioners, and the Idaho Department of Water Resources must be dismissed as barred by the Eleventh Amendment, and for failure to state a claim under 42 U.S.C. § 1983. The defendants additionally submit that the Tribe's action against Governor Cecil D. Andrus, Secretary of State Pete Cenarrusa, Attorney General Larry EchoHawk, State Auditor J.D. Williams, Superintendent of Public Instruction Jerry Evans, and Department of Water Resources Director Keith Higginson must be dismissed as barred by the Eleventh Amendment, for failure to state a quiet title claim against the individual officers, and for failure to state a claim under 42 U.S.C. § 1983.

Respectfully submitted this 13th day of November, 1991.

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CERTIFICATE OF MAILING

I hereby certify that on the 13th day of November, 1991, I caused to be served a true and correct copy of the foregoing MOTION TO DISMISS and BRIEF IN SUPPORT OF MOTION TO DISMISS to be:

☒ mailed
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE)	
OWNERSHIP OF THE)	
BEDS AND BANKS AND	)	Case No. CIV91-0437-
ALL WATERS OF ALL	)	N-HLR
NAVIGABLE WATER)	
COURSES WITHIN THE)	
1873 COEUR D'ALENE)	
RESERVATION BOUNDARY)	
<hr/>		
COEUR D'ALENE TRIBE)	
OF IDAHO, et al.,)	
Plaintiffs,	)	REPLY BRIEF IN
	)	SUPPORT OF
vs.	)	MOTION TO DISMISS
STATE OF IDAHO, et al.,)	
Defendants.)	
<hr/>		

INTRODUCTION

The Coeur d'Alene Tribe (Tribe) asserts that this action is essentially a "border dispute" between two sovereigns, and that this Court must give special consideration to the Tribe's claims because of its sovereign status. Controlling authorities do not support such assertions.

Indian tribes are quasi-sovereign entities with certain rights of self-government and control of internal affairs, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. ___, 109 S. Ct. 2994, 3005, 106 L.Ed.2d 343, 360 (1989) (plurality op). The unique status of Indian tribes within our federal system, however, does not change the underlying presumption in favor of state ownership of submerged lands. The test for determining whether the United States conveyed submerged lands to an Indian tribe is the same as the test used to determine whether submerged lands were conveyed to a private party. *Compare Montana v. United States*, 450 U.S. at 551-554, with *Shively v. Bowlby*, 152 U.S. 1, 48-50 (1894). No special consideration is given to tribes claiming ownership of submerged lands.

Moreover, the state's sovereign title to submerged lands is not affected by the location of such lands within the borders of an Indian reservation. Regardless of whether the submerged lands are located inside or outside a reservation, ownership of such lands is presumed to be in the state. *See Montana v. United States*, 450 U.S. 544, 554 (1981). Analysis of the state's motion to dismiss must take place in light of this presumption of state ownership.

The Tribe warns that failure to hear this "border dispute" in federal court would be "an ominous departure for our system of ordered liberty." Tribe's Brief at 2. Territorial disputes between governments, however, are often found to be outside the jurisdiction of federal courts. A prime example is *Block v. North Dakota*, 461 U.S. 273 (1983), in which North Dakota attempted to sue the United States to quiet title to a disputed riverbed. The Supreme Court held that the state's claim was barred by the doctrine of sovereign immunity, despite the fact that the state's only remedy would be to continue to assert its title "in hope of inducing the United States to file its own quiet title suit. . . ." *Id.* at 291-92. Thus, this Court is not obligated to provide the Tribe a forum for its claims. Moreover, the Tribe has other remedies. For example, the Tribe has already indicated that the United States may file suit on its behalf. Further, as noted by the Tribe, the state is subject to quiet title suits in state courts.

A. THE ELEVENTH AMENDMENT BARS ALL SUITS AGAINST STATES AND STATE AGENCIES, REGARDLESS OF THE RELIEF SOUGHT.

The Eleventh Amendment is a key component of the notion of federalism. It stands for the proposition that a state may not be sued in a federal court without its consent. The basic requirements of the Eleventh Amendment are fairly simple:

A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity. If the State is named directly in the complaint and has not

consented to the suit, it must be dismissed from the action.

Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 684 (1982).

This Eleventh Amendment applies equally to suits brought by private plaintiffs and Indian tribes. In *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991), the Ninth Circuit Court of Appeals did not recognize any special standing of Indian tribes to seek prospective relief directly against states. The court held only that the village could obtain injunctive relief against the Commissioner of the Department of Health and Social Services. *Id.* at 552. In so holding, the court did treat the tribe any differently than a private plaintiff; the court simply applied the rule of *Ex parte Young*, 209 U.S. 123 (1908), which allows prospective injunctive relief against state officials. As discussed *infra*, prospective relief against state officials is not available in this case because it would operate directly against the state's sovereign interests in submerged lands.

The Tribe, however, goes further, and asserts that the court in *Venetie* authorized tribes to seek direct injunctive relief against states. It relies on the Ninth Circuit's statement that the district court should "provide the relief necessary to ensure that the State of Alaska affords full faith and credit to adoption decrees issued by the Tribal courts." 944 F.2d at 562. This statement, however, should not be construed as authorizing direct injunctive relief against states. It is unlikely that the court would make such a radical change in Eleventh Amendment jurisprudence in an offhand manner, with neither analysis nor

explanation. A fairer reading of the Ninth Circuit's statement is simply that injunctive relief against state officials available under *Ex parte Young* would operate indirectly against the State of Alaska.

B. THE STATE HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY TO QUIET TITLE ACTIONS.

The Tribe argues at length that within Idaho state courts, quiet title actions are *in rem* and may be maintained against the State. Such argument is completely irrelevant to the question before the court. The fact that a state has waived its immunity within its own courts is "not determinative of whether [a state] has relinquished its Eleventh Amendment immunity from suit in federal courts." *Edelman v. Jordan*, 415 U.S. 651, 677 n. 19 (1974); *Chandler v. Dix*, 194 U.S. 590, 591-92 (1904). In order for a state to waive its Eleventh Amendment immunity, it must "give an 'unequivocal indication' that it consents to be sued in federal court." *Collins v. Alaska*, 823 F.2d 329, 331 (9th Cir. 1987), quoting *Charley's Taxi Radio Dispatch v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987). Such an indication may be found where:

- (1) the state expressly consents; (2) a state statute or constitution so provides; or (3) Congress clearly intended to condition the state's participation in a program or activity on the state's waiver of immunity.

Collins, 823 F.2d at 331-332. Moreover, the waiver "must extend explicitly to suits in federal court." *Leer v. Murphy*, 844 F.2d 628, 632 (9th Cir. 1988).

None of the state court decisions cited by the Tribe address the Eleventh Amendment. They only address the state's common law immunity. Nor do the cases say anything about suits in federal court. Under such circumstances, the state court decisions are not sufficient to waive the state's Eleventh Amendment immunity. See *Leer v. Murphy*, 844 F.2d at 632 (Idaho Supreme Court decision finding waiver of state's sovereign immunity "does not provide the requisite express language to indicate that Idaho has waived its eleventh amendment immunity").¹

Nor does the nature of a case as *in rem* or *in personam* affect the state's Eleventh Amendment immunity:

The fact that a suit in a federal court is *in rem* or *quasi in rem*, furnishes no ground for the issue of process against a non-consenting State. . . . [W]hen the State . . . withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit.

Missouri v. Fiske, 290 U.S. 18, 28 (1933).

A different outcome is not required merely because a quiet title suit is brought by an Indian tribe. The Tribe suggests that *Aquilar v. Kleppe*, 424 F. Supp. 433 (D. Alaska

¹ See also *Skokomish Indian Tribe v. France*, 269 F.2d 555 (9th Cir. 1959). Contrary to the Tribe's assertions, the outcome in *Skokomish* was not determined by whether Washington possesses the right to assert *in personam* immunity in quiet title actions. In fact, the court noted that Washington, like Idaho, would be amenable to the suit if it were brought in a state court, but held that consent to be sued in state court is not sufficient to waive Eleventh Amendment immunity. *Id.* at 562.

1976), which barred a tribal native's quiet title action against a state, would have been decided differently if the tribe, instead of an individual, had filed the quiet title action. The Tribe cites dicta that in such circumstances the Eleventh Amendment "would be overcome." 424 F. Supp. at 437. The dicta in *Kleppe*, however, is based on language in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 1634 (1976), which was interpreted, at that time, as allowing Indian tribes to step into the shoes of the federal government and sue states in federal court. This interpretation of *Moe* was soundly rejected by the Supreme Court in *Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578, 2584, 115 L.Ed.2d 686, 697 (1991).

C. THE PROSPECTIVE RELIEF REQUESTED AGAINST STATE OFFICERS MUST BE ANALYZED TO DETERMINE ITS PRACTICAL EFFECT ON THE STATE'S SOVEREIGN INTERESTS.

It is beyond question that the Tribe's action to quiet title cannot be maintained against the state officers named in the Tribe's complaint. The complaint does not allege that the officers personally claim title to the disputed submerged lands. The only cloud on the Tribe's alleged property interest is the state's claim of ownership. Thus, this court could grant the Tribe's requested quiet title relief only by reaching the question of the state's title. Such quiet title claims by Indian tribes against state officers are barred by the Eleventh Amendment. *Many-penny v. United States*, 15 Ind. Law Rptr. 3024, 3029 (D. Minn. 1988), *aff'd*, 948 F.2d 1057 (8th Cir. 1991).

Therefore, the only claim remaining against the individual state officers is the Tribe's claim to enjoin the officers from possessing and managing the disputed submerged lands. As a general rule, plaintiffs may seek prospective injunctive relief against state officers. *Mazur v. Hymas*, 678 F. Supp. 1473, 1476 (D. Idaho 1988). This Court, however, has recognized the need to analyze relief requested against state officers in order to determine its practical effect on the state. *Id.* Such an analysis is especially necessary in the context of a suit to quiet title to, or gain possession of, submerged lands. Because of the unique status and properties of submerged lands, ejectment of state officers from possession of submerged lands would have tremendous practical effects upon the state and its sovereign rights.

Submerged lands are "held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Kootenai Environmental Alliance, Inc., v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 625, 671 P.2d 1085, 1088 (1983), quoting *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

This "public trust" is "an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *Id.* at 631, 671 P.2d at 1094, quoting *National Audubon Society v. Superior Court of Alpine County*, 189 Cal. Rptr. 346, 360-61, 658 P.2d 709, 723-724 (1983).

The public trust distinguishes submerged lands from other lands held for public purposes. *Id.* In order to fulfill public trust requirements, states must actively manage submerged lands to prevent unauthorized encroachments and protect public values. Because active management and protection of submerged lands is an integral component of sovereign ownership, ejectment of state officials from possession would be tantamount to denying the state the ability to fulfill its public trust duties.

For these reasons, the Tribe's present action must be distinguished from the ejectment actions against state officers relied upon by the Tribe. In each of those cases, the state officers had taken possession of property previously in custody of the plaintiff and asserted ownership on behalf of the state. For example, in *United States v. Lee*, 106 U.S. 196 (1882), the United States bought the plaintiff's property at an allegedly defective tax sale. In *Tindal v. Wesley*, 167 U.S. 205 (1897), the state sold the plaintiff a piece of real property, then repossessed it for a defect in payment. Finally, in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), the state officers retained possession of artifacts from an abandoned shipwreck even after it was discovered that the wreck was not on state lands. The Court stated that the officers did not have even a "colorable claim" to the artifacts. *Id.* at 694.

In contrast, the Tribe's present action seeks property which, under the United States Constitution, passed to the State at statehood in 1890 for the benefit of all state citizens. So far as the state has been able to determine, the Tribe did not dispute the state's ownership of the submerged lands until sometime after 1972, when it asserted ownership as part of proceedings before the Federal

Energy Regulatory Commission (FERC) to license hydro-power facilities owned by the Washington Water Power Co. See 13 FERC ¶ 63,051 (1980).

Given the long history of state ownership and possession, and the Tribe's apparent acquiescence to the state's ownership, the constitutional concerns present in *Lee*, *Tindal*, and *Treasure Salvors* are not present here. Those ejectment actions were allowed to proceed against state officers because any other result would allow a state, through its officers, to seize property without making compensation to the owner, thus violating constitutional prohibitions against the taking of property. See *Treasure Salvors*, 458 U.S. at 687 n. 22; see also *Malone v. Bowdon*, 369 U.S. 643, 648 (1962) (limiting *United States v. Lee* by holding that ejectment actions against government officers are valid only where there is a claim of an unconstitutional taking of property without compensation). In this case, however, there are no concerns of an unconstitutional taking, since submerged lands are presumed, under the United States constitution, to belong to the state. See *State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977) (state's title to submerged lands conferred by "the Constitution itself"). Far from unlawfully seizing property, the state's officers are acting in accordance with the state's presumed ownership.

Thus, the Tribe's claims are not analogous to the cases upholding ejectment actions against state officers. The Tribe seeks to divest the state of its longstanding ownership of submerged lands, an ownership which the Tribe did not directly challenge until the filing of this action, over 100 years after statehood. The practical effect of allowing the Tribe to proceed against the named state

officers is to allow the Tribe to proceed directly against the state's sovereign interests. Such actions are barred by the Eleventh Amendment.

D. THE RIGHTS CLAIMED BY PLAINTIFFS ARE NOT WITHIN THE SCOPE OF 42 U.S.C. § 1983.

The state submits that it is unnecessary to reach the issue of whether the plaintiffs' action can be sustained under 42 U.S.C. § 1983, because the actions of both the Tribe and the individual tribal members are barred by the Eleventh Amendment. Section 1983 does not abrogate the Eleventh Amendment immunity of the states. *Will v. Michigan Dep. of State Police*, 491 U.S. 58, 66-67 (1989). If, however, this Court finds that some portion of the plaintiffs' claims are not barred by the Eleventh Amendment, the claims still fail because they are not within the scope of § 1983.

The plaintiffs concede that the Tribe's claims are not within the scope of § 1983. Tribe's Brief at 14. As discussed in the state's original brief, the claims of the individual plaintiffs are also outside the scope of § 1983. The plaintiffs so much as admit that their claims are not individual rights when they state on page 2 of their brief that "[t]his matter is essentially a border dispute between two sovereigns." Furthermore, the face of the plaintiffs' complaint fails to identify any constitutional provisions or statutes securing rights to the individual tribal plaintiffs. The executive order and statutes cited by the plaintiffs are alleged only to secure rights to the Coeur d'Alene Tribe.

The plaintiffs try to rectify this error by citing two statutes which supposedly secure property rights to the individual plaintiffs. The first, 8 U.S.C. § 1401, provides that the granting of federal citizenship to tribal members does "not in any manner impair or otherwise affect the right of such person to tribal or other property." This statute, however, does nothing to secure the rights asserted in this case. It merely provides that the citizenship granted to Native Americans in 1924 would not affect whatever rights individual tribal members may have enjoyed prior to gaining citizenship.

The second statute cited by the plaintiffs is the Non-intercourse Act of 1790, 25 U.S.C. § 177, which provides that conveyances of lands from tribes or tribal members are invalid unless approved by the United States. The purpose of 25 U.S.C. § 177 is to "prevent unfair, improvident, or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress. . . ." *Federal Power Comm'n v. Tuscorora Indian Nation*, 362 U.S. 99, 119 (1960). The statute does not secure any property rights to individual tribal members, but merely voids attempted conveyances of tribal property to private individuals. In fact, "individual Indians do not even have standing to contest a transfer of tribal lands on the ground that the transfer violated [the Nonintercourse Act]." *United States v. Dann*, 873 F.2d 1189, 1195 (9th Cir. 1989), *cert. denied*, 493 U.S. 890 (1989); *James v. Watt*, 716 F.2d 71, 72 (1st Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). It is axiomatic that since the individual tribal members lack standing to invoke the Nonintercourse Act, they have no claim that the Act secures rights to them for purposes of § 1983.

Canadian St. Regis Band of Mohawk Indians v. New York, 573 F. Supp. 1530, 1537 (N.D. N.Y. 1983).

Justice Rehnquist's concurring opinion in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), is not to the contrary. In *Oneida*, the suit claiming violation of the Nonintercourse Act was brought by the Tribe, not by individual tribal members. The issue before the Court was whether the Tribe's claims presented a federal question justiciable under 28 U.S.C. §§ 1331 and 1362. As Justice Rehnquist noted, the Tribe's complaint was basically one in ejectment, alleging that the defendants were in wrongful possession of the Tribe's property because the Tribe's previous conveyance of those lands to the state was in violation of the Nonintercourse Act. 414 U.S. at 683. Thus, Justice Rehnquist concluded that a federal question existed because the Tribe's claim, as pleaded, arose under the Nonintercourse Act. Justice Rehnquist did not state that the Nonintercourse Act is a general guarantee of tribal property rights in every case where a Tribe or its members alleges an interest in property.

In addition to 8 U.S.C. § 1401 and 25 U.S.C. § 177, the plaintiffs allege that 26 Stat. 1027, ratifying the 1887 and 1889 Agreements between the Coeur d'Alene Tribe and the United States, secures rights to the individual plaintiffs "which truly form the basis of this suit." The plaintiff's complaint, however, belies this assertion. The plaintiffs trace their alleged interests in the submerged lands to aboriginal title and the 1873 Executive Order. Complaint, ¶¶ 19 and 23. The 1887 Agreement is alleged only to provide that the Coeur d'Alene Reservation "was to be held for the Coeur d'Alenes and other Indians."

Complaint, ¶ 20. As discussed *supra*, the mere creation of an Indian reservation is irrelevant to the question of state ownership of submerged lands. See *Montana v. United States*, 450 U.S. 544, 554 (1981). The 1889 Agreement is alleged only to not affect or cede the Tribe's alleged rights in the submerged lands. Complaint, ¶ 21. Such an allegation is not sufficient to state a claim under 42 U.S.C. § 1983 that the plaintiffs seek to protect rights "secured" to them by federal statute.

Moreover, it is clear that in order to grant the plaintiffs relief under the Agreements of 1887 and 1889, the Court would have to interpret the language and intent of the Agreements. Suits in which the requested relief is dependent upon interpretation of tribal treaties or agreements are not within the scope of § 1983. *United States v. Washington*, 813 F.2d 1020, 1022-23 (9th Cir. 1987); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 663 (9th Cir. 1989). An actual conflict between state and federal law which might give rise to a § 1983 action cannot occur until such time as the tribe's rights under the treaty or agreement are definitely ascertained through judicial interpretation. *United States v. Washington*, 813 F.2d at 1023.

CONCLUSION

For the reasons stated in this brief and the state's original brief, the plaintiffs' claims must be dismissed as required by the Eleventh Amendment of the United States Constitution.

Respectfully submitted this 6th day of March, 1992.

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CERTIFICATE OF MAILING

I hereby certify that on the 6th day of March, 1992, I caused to be served a true and correct copy of the foregoing Reply Brief In Support of Motion to Dismiss by U.S. Mail, postage prepaid, and addressed to:

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No. 94-1474

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1995

IDAHO, et al.,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE PETITIONER

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** Counsel of Record*

QUESTIONS PRESENTED

1. The Eleventh Amendment bars federal courts from hearing quiet title actions brought by Indian tribes against a state to adjudicate title to, and gain possession of, waters and submerged lands held by the state under the equal footing doctrine of the United States Constitution. The issue presented by this case is whether a federal court may nonetheless hear an action against state officers for injunctive and declaratory relief when such relief requires adjudication of the state's equal footing title and will deprive the state of all practical benefits of ownership of the disputed waters and submerged lands.
2. The President, absent an express delegation of Congress' exclusive authority over public lands, cannot convey title of uplands to Indian tribes. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). The issue presented in this case is whether the President, acting without express congressional authority, can nonetheless convey title of the beds and banks of navigable waters to an Indian tribe, thereby defeating a state's entitlement to such lands under the equal footing doctrine of the United States Constitution.

PARTIES TO THE PROCEEDING

In addition to Coeur d'Alene Tribe, the appellants below include Ernest L. Stensgar, Lawrence Aripa, Margaret Jose', Domnick Curley, Al Garrick, Norma Peone and Henry Sijohn, individually, in their official capacity and on behalf of all enrolled members of Coeur d'Alene Tribe. The respondents below include, in addition to the State of Idaho, the Idaho State Board of Land Commissioners; the Idaho State Department of Water Resources; Phil Batt, Governor; Pete Cenarrusa, Secretary of State; Alan G. Lance, Attorney General; J.D. Williams, Controller; Anne Fox, Superintendent of Public Instruction; and Karl J. Dreher, Director, Department of Water Resources; each individually and in his official capacity.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. at 1)¹ is reported at 42 F.3d 1244 (9th Cir. 1994). The opinion of the district court (Pet. App. at 29) is reported at 798 F. Supp. 1443 (D. Idaho 1992).

JURISDICTION

The court of appeals entered its judgment on December 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution provides:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The Property Clause of the United States Constitution, Art. IV, § 3, cl. 2, provides in relevant part:

¹ All references to the appendix in this case are to the respective appendices in the Petition for the Writ of Certiorari (Pet. App.) or the Brief in Opposition to Petition for a Writ of Certiorari (Resp. App.).

The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . .

STATEMENT OF THE CASE

This action challenges two essential attributes of Idaho's sovereignty guaranteed by the United States Constitution – title to lands under navigable waters and immunity to suit in federal court. The Coeur d' Alene Tribe seeks to quiet title to the waters and beds and banks (hereinafter submerged lands) of Lake Coeur d'Alene and its associated waterways, the Coeur d'Alene River, the Spokane River and the St. Joe River. The Tribe's action threatens the sovereign authority of the state of Idaho, which assumed title and sovereignty over all submerged lands within its borders upon its admission to the Union on July 3, 1890.

The waterways at issue are adjacent to lands set aside for the use of the Coeur d'Alene Tribe by executive order on November 8, 1873. The original Coeur d'Alene Reservation encompassed the lands adjacent to Lake Coeur d'Alene, as well as lands adjacent to the lower reaches of the Coeur d'Alene River, the Spokane River and the St. Joe River. The Reservation was later reduced by agreement, however, and today only the lower reaches of the St. Joe River and the southern third of Lake Coeur d'Alene are within the exterior boundaries of the Coeur d' Alene Indian Reservation. Act of March 3, 1891, 26 Stat. 989, 1027.

Following the reduction of the Reservation, and the opening of the remaining Reservation lands to non-Indian settlement, Act of June 21, 1906, 34 Stat. 325, 335, private homes and businesses were located on the lands adjacent to Lake Coeur d'Alene. Residents of nearby cities and towns came to rely on the lake and the rivers for both commerce and recreation. Recognizing the importance of Lake Coeur d'Alene to the citizens of Idaho, the state legislature in 1927 dedicated and preserved the waters of Lake Coeur d'Alene for the purposes of "scenic beauty, health, recreation, transportation and commercial purposes." Idaho Code § 67-4304 (1995). The submerged lands of Lake Coeur d'Alene were "devoted to a public use in connection with the preservation of said lakes in their present condition as a health resort and recreation place for the inhabitants of the state." Idaho Code § 67-4305 (1995). The management of Lake Coeur d'Alene and other navigable waterways is vested in the state board of land commissioners, a constitutional body consisting of the governor, the attorney general, the secretary of state, the state controller, and the superintendent of public instruction. Idaho Code § 58-104(9) (1995).

State ownership of all submerged lands under navigable waters was confirmed by the Idaho Supreme Court in an action brought against the state board of land commissioners and a private yacht club seeking to enjoin a lease of the bed of Lake Coeur d'Alene for a marina. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983). As part of its decision upholding the lease, the court confirmed that under the equal footing doctrine and the Idaho Admission Bill, Act of July 3, 1890, 26 Stat. 215, Idaho holds title

to the submerged lands under Lake Coeur d'Alene for the use and benefit of the public. 671 P.2d at 1088.

The Coeur d'Alene Tribe brought the instant action against the state of Idaho, the state board of land commissioners and its members, the department of water resources, and the director of the department of water resources. The Tribe asserted title to the submerged lands and waters of all navigable waterways within the original Coeur d'Alene Reservation. The Tribe asked the federal district court to quiet title in the Tribe to the submerged lands and waters at issue, and to declare that the Tribe is entitled to the exclusive use and occupancy of submerged lands and waters. It asked the court to declare invalid all Idaho statutes, ordinances and regulations purporting to regulate, authorize use, or affect in any way the beds, banks and waters at issue. It also asked the court to permanently enjoin the defendants from regulating, permitting, or taking any action in violation of the Tribe's asserted right of exclusive use and occupancy. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 (general federal question), 1343(4) (civil rights actions) and 1362 (actions brought by Indian tribes).

The state moved to dismiss the Tribe's action under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The state asserted the Eleventh Amendment barred the court from adjudicating the state's title to the submerged lands at issue. It also asserted the complaint failed to state a claim against the individual officers, since they held no title, claim or interest in the disputed lands. Following briefing and argument, the district court granted the motion and dismissed the case. *Coeur d'Alene Tribe of Idaho v. Idaho*, 798 F. Supp. 1443 (D. Idaho 1992), Pet. App. at 29.

The district court held that the Eleventh Amendment barred the Tribe's actions for relief against the state and state agencies. In regard to the action against state officials, the court held the Tribe's claims for declaratory and quiet title relief were barred by the Eleventh Amendment. 798 F. Supp. at 1449, Pet. App. at 39-40.

The court also concluded that the injunctive relief sought by the Tribe did not fall within the exceptions to Eleventh Amendment immunity established in *Ex parte Young*, 209 U.S. 123 (1908), because the complaint failed, as a matter of law, to state a violation of rights protected and secured by federal law. 798 F. Supp. at 1449-52, Pet. App. at 40-47. In reaching its conclusion, the district court examined the Tribe's allegation that the 1873 executive order explicitly reserved title for the Tribe, and determined that such an allegation was not supported by the express language of the executive order. *Id.* The court relied on *Montana v. United States*, 450 U.S. 544 (1981), which interpreted a nearly identical provision in a treaty with the Crow Tribe of Montana. 798 F. Supp. at 1449-52, Pet. App. at 40-47. Based on the similarities in the provisions, the district court found that the Tribe's assertion of title under the 1873 executive order "is indefensible and is contrary to the clear holding in *Montana*, and the strong presumption in favor of these lands being conveyed to the state of Idaho upon its entry into the Union." 798 F. Supp. at 1451, Pet. App. at 46. Following the directives of the *Montana* decision, which requires an affirmative, pre-statehood action by Congress to defeat a state's title to submerged lands, the district court dismissed the Tribe's action in its entirety.

The Ninth Circuit Court of Appeals upheld the dismissal of the Tribe's claims against the state and the state agencies. *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244 (9th Cir. 1994), Pet. App. at 1. The court of appeals, however, reversed the district court's decision insofar as it barred the Tribe from seeking injunctive and declaratory relief against the state officers. The court applied the three-prong test from the Court's plurality decision in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).

(a) Is this action asserted against officials of the State or is it an action brought directly against the State itself? (b) Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? (3) Is the relief sought by [plaintiffs] permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury"?

42 F.3d at 1250. Pet. App. at 10-11, quoting *Treasure Salvors*, 458 U.S. at 690.

The court of appeals determined that under the first prong of this test, the Tribe's action was not asserted against the state. The court of appeals reached this determination not by examining the effect of the action on the state's interests, but rather by resorting to the general principle defined in *Ex parte Young*, 209 U.S. 123 (1908), that suits alleging that state officers are in violation of federal law are not deemed to be suits against the state. The court noted that the Tribe "alleges that it holds the property at issue pursuant to an executive order that was

ratified as a federal statute." 42 F.3d at 1251, Pet. App. at 12. The Ninth Circuit concluded that "[b]ecause the Tribe has alleged that the actions of the Officials in exercising control over the property at issue violate this federal law, the Officials must be considered the real parties in interest in the claims against them." *Id.*

In regard to the second prong of the test, the court concluded that the Tribe's complaint "adequately alleges an ongoing violation of a federal right." The court did not explain the basis for this conclusion, but apparently assumed that state management of the lands would be inconsistent with tribal ownership. 42 F.3d at 1251, Pet. App. at 14.

The major portion of the court's opinion addresses the third prong of the test – whether the relief sought is prospective or whether it is analogous to a retroactive award. The court first examined a series of appellate and district court decisions holding that suits for injunctive and declaratory relief against state officers are barred by the Eleventh Amendment when the requested relief requires adjudication of a state's interest in disputed property. 42 F.3d at 1253, Pet. App. at 16-19. It then proceeded to explain why it was not following those decisions. The court recognized "the fiction that an action in violation of federal law cannot be an action of the state breaks down when confronted by the state's claim of title to property." 42 F.3d at 1254, Pet. App. at 21. Nonetheless, the court of appeals concluded that "this creates no exception to the rule that when federal law conflicts with the state's claim, state officials must act in accordance with federal law." *Id.* In the court's view, this conundrum was resolved when courts "allowed all relief other than

relief that would foreclose the state's claim in future judicial proceedings." *Id.* Thus, the court concluded that the district court "may decree the Tribe to be the owner of the property against all claimants except the state of Idaho and its agencies." 42 F.3d at 1255, Pet. App. at 22.

After finding that the Tribe's suit could proceed against the state officers, the court addressed the issue of whether the Tribe's complaint failed to state a claim for the submerged lands under the executive order initially establishing the Coeur d'Alene Reservation. The court assumed that all reservations in favor of Indian tribes should be treated as conveyances for purposes of determining whether a pre-statehood action was intended to defeat a future state's title to submerged lands. 42 F.3d at 1256-57, Pet. App. at 24-27. The court did not discuss decisions from this Court limiting the interests transferred to Indian tribes by executive orders. Nor did it discuss decisions from this Court establishing that only Congress has the authority to convey submerged lands to private parties.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals erred in holding that the Coeur d'Alene Tribe may proceed with its action for recovery of the disputed submerged lands by obtaining declaratory and injunctive relief against state officers. This Court's decisions have repeatedly confirmed that disputes over submerged lands must start from the "established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty." *Montana v.*

United States, 450 U.S. 544, 553 (1981). The Tribe could not obtain the relief it requests without rebutting this presumption and adjudicating the question of the state's title. Because of the impossibility of proceeding without reaching the question of the state's title to the disputed lands, the action is barred by the Eleventh Amendment, even if the only remaining defendants are state officers.

The presumption of state title also removes this case from the doctrine established in *Ex parte Young*, 209 U.S. 123 (1908), allowing actions against state officers when the officer's actions are alleged to be unconstitutional. Because the state is operating under an established presumption of title, it was within the state's constitutional authority to authorize the officers to possess the submerged lands. Under such circumstances, the officer's actions are so closely identified with those of the state as to make it impossible to proceed against the officers without adjudicating the state's sovereign interests in the disputed lands.

The state is also able to establish immunity under the three part test established by a plurality of this Court in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). First, the nature of the Tribe's complaint establishes that the action is intended to adjudicate the sovereign interests of the state. Second, the challenged conduct of the state officers is not alleged to be either unconstitutional or outside the officers' statutory authority, and in fact is presumed to be constitutional under the equal footing doctrine. Third, the harm alleged by the Tribe is not the result of the ongoing management of the lands by the state, but rather is the result of the state's assumption of sovereignty over the submerged lands over a century

ago. The Tribe's action is therefore most analogous to retroactive relief and is barred by the Eleventh Amendment.

The court of appeals also erred in holding that executive orders issued without express congressional authorization may convey submerged lands to Indian tribes. This Court has repeatedly confirmed that the authority to defeat a state's equal footing title to submerged lands is vested exclusively in Congress by the Property Clause, which vests Congress with the entire dominion and sovereignty over territories. Congress never undertook to delegate such sovereign authority to the President. Although a general delegation of authority to reserve lands was established for the President by congressional acquiescence, such delegation was expressly limited by this Court to lands otherwise available for disposition under the general land laws. Even assuming that the President's authority extended to submerged lands, such authority was limited to the power to withdraw or reserve lands. The President could not convey submerged lands to Indian tribes. Therefore, any determination as to whether an executive order defeats a state's title to submerged lands must overcome the stronger presumption of state title established by this Court for alleged reservations of submerged lands.

ARGUMENT

I. THE ELEVENTH AMENDMENT PROHIBITS THE USE OF AN OFFICER SUIT TO DETERMINE STATE TITLE TO SUBMERGED LANDS UNDER NAVIGABLE WATERS.

Suits seeking to dispossess government officers of property claimed by private citizens have vexed this Court for over a century. After it was established that sovereign immunity would prevent suits against the state and national governments to quiet title to disputed property, plaintiffs attempted to circumvent such immunity by suing government officers instead:

Enterprising claimants also pressed the so-called "officer's suit" as another possible means of obtaining relief in a title dispute with the Federal Government. In the typical officer's suit involving a title dispute, the claimant would proceed against the federal officials charged with supervision of the disputed area, rather than against the United States. This suit would be in ejectment or, as here, for an injunction or a writ of mandamus forbidding the defendant officials to interfere with the claimant's property rights.

Block v. North Dakota ex rel. Board of Univ. and School Lands, 461 U.S. 273, 281 (1983). In *Block*, this Court recognized that if such suits were allowed, "all of the carefully crafted provisions of the [Quiet Title Act]², deemed necessary for the protection of the national public interest could be averted." 461 U.S. at 284-85. Likewise, if officer

² Codified at 28 U.S.C. §§ 2409a, 1346(f), and 1402(d).

suits are allowed against state officials, the right of the state under the Eleventh Amendment to determine whether third parties may sue it will be rendered a nullity.³ The state submits that the Eleventh Amendment is not so narrow as to allow state claims to submerged lands to be tried behind the state's back simply by removing the state as a nominal party.

A. Actions Seeking Ownership And Possession Of Submerged Lands Under Navigable Waters Necessarily Require Adjudication Of State Sovereign Rights.

Although the crux of this case is the sovereign immunity guaranteed to Idaho by the Eleventh Amendment, analysis of the issue must begin with a discussion of the principles relating to the state's sovereign title to submerged lands. The unique nature of sovereign title will in large part determine whether suits against officers for possession of disputed submerged lands can proceed without affecting the sovereignty protected by the Eleventh Amendment.

One of the essential postulates of the United States Constitution is that states retain all aspects of sovereignty

³ This Court has often looked to cases against federal officers in determining the extent of sovereign immunity under the Eleventh Amendment: "[I]t cannot be doubted that the question whether a particular suit is one against the state, within the meaning of the constitution, must depend upon the same principles that determine whether a particular suit is one against the United States." *Tindal v. Wesley*, 167 U.S. 204, 213 (1897).

not expressly granted to the federal government or otherwise limited by the terms of the Constitution. Among these essential attributes of sovereignty is the English common law principle that ownership of submerged lands is inherent in the sovereign because it is vital to the sovereign's ability to control navigation, fishing, and other public uses of water. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). The principle arose because submerged lands "are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects." *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). The title, *jus privatum*, of submerged lands is held by the sovereign, while "the dominion thereof, *jus publicum*, is vested [in the sovereign] as the representative of the nation and for the public benefit." *Id.*

When the 13 colonies became independent from Britain, they succeeded to the English Crown's title to submerged lands. Because it is implicit in the Constitution that subsequently admitted states enter the Union on an "equal footing" with the 13 original states, they too hold title to lands under navigable waters within their boundaries. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). Upon admission, states have "absolute property in, and dominion and sovereignty over" all submerged lands. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977), quoting *Weber v. Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65-66 (1873).

Under the equal footing doctrine, Idaho's title to Lake Coeur d'Alene can be traced to the United States'

assumption of sovereignty over the Oregon Territory in 1848. Act of August 14, 1848, 9 Stat. 323. Once the United States assumes sovereignty over a Territory, it holds all navigable waters therein in trust for the benefit of the future states to be created from the Territory. *Shively v. Bowlby*, 152 U.S. at 49. Idaho assumed sovereign title to Lake Coeur d'Alene in 1890, when Congress admitted Idaho into the Union on an "equal footing with the original states in all respects whatever." Act of July 3, 1890, 26 Stat. 215 § 1. Title vested automatically in the state upon admission to the Union without further action from Congress. *Shively v. Bowlby*, 152 U.S. at 27.

The Idaho Admission Act, with its express guarantee of equal footing for Idaho, is legal documentation of Idaho's title to all submerged lands within its borders. The state's title "is conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). State title is absolute and cannot be limited or modified by Congress: "Congress could exact of the new state the surrender of no attribute inherent in her character as a sovereign independent state or indispensable to her equality with her sister states, necessarily implied and guaranteed by the very nature of the Federal compact." *Shively v. Bowlby*, 152 U.S. at 34, quoting *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1857).⁴

⁴ See also *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977) (recognizing "absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party was capable of defeating").

In order to fulfill the above principles, any action involving title to submerged lands must necessarily start from the "established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty." *Montana v. United States*, 450 U.S. 544, 553 (1981). This presumption applies with equal force to submerged lands within the boundaries of Indian reservations. In *Montana*, the Court rejected the Crow Tribe's claim to the submerged lands of the Big Horn River, holding that "[t]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land. . . ." 450 U.S. at 554. In *United States v. Holt State Bank*, 270 U.S. 49 (1926), the Court held that the mere establishment of an Indian reservation did not operate "as a disposal of lands underlying navigable waters within its limits." *Id.* at 58.

Any allegation that Congress conveyed submerged lands to Indian tribes or other parties prior to statehood must overcome the strong presumption of state title by evidence demonstrating that Congress' intent to convey the lands was "definitely declared or otherwise made plain," was rendered "in clear and especial words," or "the claim confirmed in terms embraces the land under the waters of the stream." *Montana*, 450 U.S. at 552, quoting *United States v. Holt State Bank*, 270 U.S. at 55, *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 411 (1842), and *Packer v. Bird*, 137 U.S. 661, 672 (1891). Further, because of the strong federal policy against conveyance, "it will not be held that the United States has conveyed such land

except because of 'some international duty or public exigency.' " *Montana*, 450 U.S. at 552, quoting *United States v. Holt State Bank*, 270 U.S. at 55.⁵

The presumption of state ownership is even stronger when the federal action alleged to defeat state title is a reservation of lands for a specific federal purpose. In such cases, the "land remains in federal control, and therefore may still be held for the ultimate benefit of future States." *Utah Div. of State Lands*, 482 U.S. at 202. This Court has raised doubts as to whether a reservation of lands could ever be sufficient to defeat a state's title to such lands. *Id.* at 201. Nevertheless, it has ruled as follows:

Given the longstanding policy of holding land under navigable waters for the ultimate benefit of the States, therefore, we would not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself.

⁵ The presumptions and burdens of proof required by *Montana* and other cases for conveyances of submerged lands are established "because control over the property underlying navigable waters is so strongly identified with the sovereign power of government." *Montana*, 450 U.S. at 552. In terms of authority, however, Congress is empowered under the Property Clause to convey submerged lands "whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects of which the United States hold the Territory." *Shively v. Bowlby*, 152 U.S. 1, 48 (1893). This authority, however, was rarely utilized, since it was "congressional policy to dispose of sovereign lands only in the most unusual circumstances." *Utah Div. of State Lands*, 482 U.S. at 197.

Assuming arguendo that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land.

482 U.S. at 202.

A final rule with respect to adjudication of disputes involving submerged lands is that "we are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977). Thus, disputes over submerged lands involve not only title, but necessarily require the court to inquire into the very nature of sovereignty and the purposes for which submerged lands are held. Immunities applicable to state claims in typical property disputes must apply with even greater force when the disputed property is submerged lands. Indeed, any analysis of sovereign immunity involving disputes over submerged lands must begin with a strong presumption of state ownership.

B. Suits Against State Officers For Possession Of Property Are Barred When The Requested Relief Cannot Be Separated From Adjudication Of State Claims To The Property.

Although the Court has defined various methods of analyzing disputes involving property held by state officers, they all are intended to answer the following core question: if the case proceeds, will federal judicial power be invoked against the sovereign interests of the state?

While early cases upheld officer suits on the basis that the Eleventh Amendment is "limited to those suits in which a state is a party on the record," *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824), later decisions repudiated this position. "[I]t must be regarded as the settled doctrine of this court, established by its recent decisions, 'that the question of whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record.' " *Ex parte Ayers*, 123 U.S. 443, 487 (1887), quoting *Poindexter v. Greenhow*, 114 U.S. 270, 287 (1885). Instead, "the general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984).

The most recent case to apply the Eleventh Amendment to property disputes is *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). In *Treasure Salvors*, a salvage company discovered the wreck of the Spanish galleon Atocha on submerged lands off the Florida coast. The state claimed ownership of the Atocha pursuant to a state statute declaring state ownership of all treasure

trove and artifacts abandoned on state property. Thus, the state entered into a salvage agreement with the company, granting 75% of the artifacts to the company and keeping 25% for the state. *Id.* at 673-75. When an unrelated action declared the lands under the wreck to be federal lands, the salvage company brought an in rem admiralty action to quiet its title to the artifacts in the possession of state officers. Since the items were outside the jurisdiction of the district court, the plaintiffs obtained a warrant of arrest requiring the state officers to surrender possession of the artifacts and deliver them into the possession of a custodian appointed by the court. *Id.* at 691.

In a plurality opinion, four members of the Court concluded that the warrant of arrest should be upheld because the state officers holding the property were acting without colorable authority. The lack of a colorable claim was based on the fact that this Court had previously determined that Florida did not own the submerged land on which the artifacts were found and that no state statute asserted ownership of artifacts on submerged lands outside the state's jurisdiction. 458 U.S. at 695-96 (plurality opinion). Likewise, the contract between the state and the salvage company did not purport to provide the state title to artifacts on non-state lands. *Id.* at 694-95. The plurality concluded, "since the state officials do not have a colorable claim to possession of the artifacts, they may not invoke the Eleventh Amendment to block execution of the warrant of arrest." *Id.* at 697. The plurality's statement infers that the opposite proposition is also true: where state officers have a colorable claim to possession of disputed property, they may invoke the

Eleventh Amendment to block actions for possession of the property.

Another four members of the Court, in a dissent authored by Justice White, believed that the state officers had a colorable claim under the contract for retaining possession of the artifacts. *Id.* at 713 (White, J., concurring and dissenting). Therefore, they concluded, the court could not order the state officers to surrender possession of the artifacts without reaching the merits of the state's claims. *Id.* at 716. Any inquiry into the validity of the officers' possession would, in the dissent's view, be "tantamount to deciding the question of title itself," a result barred by the Eleventh Amendment. *Id.* at 717.

Ultimately, the warrant to arrest was upheld, since Justice Brennan, in a separate opinion, concurred in the judgment allowing injunctive relief against the state officers. Justice Brennan, however, expressly rejected the plurality's rationale, concluding instead that the Eleventh Amendment did not apply to the situation at all, since the suit was between a state and citizens of that same state, and therefore outside the literal language of the Eleventh Amendment. *Id.* at 700-702 (Brennan, J., concurring and dissenting).

The one principle agreed to by both the plurality and the dissent in *Treasure Salvors* is that suits against state officers cannot be used as vehicles for adjudicating a state's rights to disputed property. The dissent would have examined the nature of the action and the relief sought to determine whether they "were actions invoking federal judicial power against the State and not merely its

agents." 458 U.S. at 705 (White, J., concurring and dissenting). The dissent's analysis focused on the practical effects of the requested relief on the state's title, and would bar any action where the requested relief could not be "divorced" from determination of the state's claims. 458 U.S. at 703. The plurality apparently agreed with this proposition. The plurality allowed the *in rem* warrant for possession of the property to proceed on the basis that it would not adjudicate state interests. The plurality's decision was based on two factors, the first being the limited nature of the judicial process at issue. The *in rem* arrest warrant merely required the state officers to bring the disputed property "within the jurisdiction of this Honorable Court and transfer possession of same to the substitute custodian appointed in this action." 458 U.S. at 691 (plurality op.). Thus, in the plurality's view, "the warrant itself merely secures possession of the property; its execution does not finally adjudicate the State's right to the artifacts." 458 U.S. at 697. Additionally, the plurality did not believe that the arrest warrant would adjudicate any state claims because the plurality believed that the state did not have a colorable claim to adjudicate. 458 U.S. at 694-697.

Inquiring into whether requested relief can be granted without practically adjudicating the state's claims gives life to the policies underlying the Eleventh Amendment. This Court has long recognized the "problems of federalism inherent in making one sovereign appear against its will in the courts of the other," *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring). Exceptions to the Eleventh Amendment, such as that embodied in *Ex*

parte Young, must therefore be narrowly crafted and applied only when absolutely necessary to ensure protection of federal interests. *Ex parte Young* does not apply where its application "would stretch that case too far and would upset the balance of federal and state interests that it embodies." *Papasan v. Allain*, 478 U.S. 265, 277 (1986).

One instance in which *Ex parte Young* does not apply is in actions to recover money from the state. This is true not because of the effect on the treasury per se, but because in such cases there is no way to avoid acknowledging that the state "is the real, substantial party in interest." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), quoting *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945).

Likewise, in the present case, there is no way to avoid acknowledging that the state of Idaho is the real, substantial party in interest. Real property held by the state under a colorable claim of title is indistinguishable from moneys held in the public treasury. In *Dugan v. Rank*, 372 U.S. 609 (1963), this Court stated that "[t]he general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or the public domain, or interfere with the public administration.'" *Id.* at 620, quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947). Commentators have noted a similar rule in the English common law: "Where the Crown's title was involved, or an attempt was made to reach the Treasury, presumptively the act was treated as one directly against the Crown. . . ." Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 5-6 (1963). Indeed, a state's interest in submerged lands is even more inseparable from the state's sovereign

interests than is the public fisc. This Court has recognized that in cases involving submerged lands, "we are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977). Thus, it is impossible to imagine a set of circumstances where a federal district court could dispossess state officers from submerged lands without adjudicating issues affecting the very core of the state's sovereignty.

Determining the strength of the nexus between the relief sought against state officers and the adjudication of state claims to property is consistent with the focus on colorable claims adopted by the plurality in *Treasure Salvors*. Where it appears that the state does not have a colorable claim to disputed property, it is more likely that the case can proceed without adjudicating state interests. On the other hand, if an officer is in possession of property under a colorable state claim, it is unlikely that the action can proceed without inquiring into the state's title. Indeed, where a colorable state claim exists, the authority-stripping fiction of *Young* has no application. *Young* depends on the fiction that the state cannot authorize an officer to undertake an unconstitutional action. Where a state possesses a colorable claim to property, however, it can unquestionably authorize its officers to possess the property. Under such circumstances, the officer is cloaked with the authority of the state. This is so even in cases where the officer's withholding of the property would be "tortious under general law." *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949). If officers tortiously withholding property are covered by sovereign

immunity, it is axiomatic that officers holding property under color of title are also covered by sovereign immunity.

In determining whether a state possesses a colorable claim to disputed property, it will not always be necessary to go as far as the plurality did in *Treasure Salvors*. As the Seventh Circuit Court of Appeals has noted, "it is the existence, and not the strength, of the claim that activates the eleventh amendment." *Zych v. Wrecked Vessel Believed to be the "Lady Elgin,"* 960 F.2d 665, 670 (7th Cir. 1992). Likewise, the dissent in *Treasure Salvors* noted that going too far in adjudicating the validity of a state claim to title in order to determine jurisdiction "is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses." 458 U.S. at 703, quoting *Florida Dept. of State v. Treasure Salvors, Inc.*, 621 F.2d 1340, 1351 (5th Cir. 1980) (Rubin, J., dissenting).

Even if this Court were to engage in a detailed examination of the state's claims, however, it is apparent from the allegations in the pleadings and the presumptions of the equal footing doctrine that Idaho has a colorable claim to the disputed submerged lands. Under the equal footing doctrine, "[a] court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States" and the "presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty." *Montana v. United States*, 450 U.S. 544, 552, 553 (1981). The Tribe's complaint raises this presumption by alleging that Idaho was admitted into the Union under the Idaho Admission Bill. Resp. App. at 9. This allegation is sufficient to create, on the

face of the pleadings, a presumption of state title to the disputed submerged lands. Given the presumption of state title, it is beyond question that the state could authorize its officers to possess the property. State officers acting under the presumption of state title are cloaked with the state's immunity, because it would be impossible to proceed against the officers without rebutting the presumption and adjudicating the validity of the state's claims to the submerged lands.

The fact that Idaho claims title to the disputed lands under the equal footing doctrine also distinguishes this case from decisions allowing suit under the doctrine of *Ex parte Young*. Actions seeking to dispossess the state of submerged lands do not implement the policy underlying *Young*, i.e., the need to ensure the supremacy of federal law over conflicting state statutes. "*Young* applies only where the underlying authorization upon which the named official acts is alleged to be illegal." *Papasan v. Allain*, 478 U.S. 265, 277 (1986). Here, the underlying authorization for the actions of the named officials is not the state statutes providing for management of the disputed lands, but rather the Idaho Admission Act and the United States Constitution. State title to submerged lands "is the result of federal action in admitting a state to the Union." *United States v. Oregon*, 295 U.S. 1, 14 (1935). Allowing the Tribe to pursue the relief requested would thus do nothing to vindicate the supremacy of federal law over state law. Indeed, if the federal courts were to provide the relief requested by the Tribe, and enjoin enforcement of state laws and regulations regarding management of the disputed submerged lands, the state could still, through its officers, continue to exercise all inherent

rights of ownership. The court could enjoin state officers from possessing and exercising rights of ownership over the disputed lands only by adjudicating the State's claims to title under the Idaho Admission Act and the equal footing doctrine, a result barred by the Eleventh Amendment.⁶

C. Even Under The Three-Prong Test Adopted By The Plurality In *Treasure Salvors*, The Tribe's Action Is Barred By The Eleventh Amendment.

The test adopted by the plurality in *Treasure Salvors*, and the one that the court of appeals purported to follow in this case, determines whether an action is barred by the Eleventh Amendment by examining the following three questions:

⁶ The Court may also consider the fact that a potential remedy exists for the Tribe's claims in Idaho's state court system. Idaho law allows the state to be named as a party defendant in actions "affecting the title to real or personal property in which the State has, or claims to have, an interest, lien or claim." Idaho Code § 5-328 (1990). As this Court has noted, the issue in Eleventh Amendment cases is not the "general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals*." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.2 (1985), quoting *Employees v. Missouri Dept. of Public Health & Welfare*, 411 U.S. 279, 293-94 (1973) (concurring in result). Adjudication in a federal tribunal is not necessarily required in order to fulfill the interest of the national government in ensuring the supremacy of federal law. "It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Atascadero*, 473 U.S. at 238 n.2.

(a) Is this action asserted against officials of the State or is it an action brought directly against the State of Florida itself? (b) Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? (3) Is the relief sought by *Treasure Salvors* permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury"?

458 U.S. at 690.

The court of appeals misapplied the three-prong test from *Treasure Salvors* by failing to account for the presumptions favoring state claims to submerged lands. In the following sections, the state will apply the three-prong test in light of these presumptions and demonstrate the necessity of dismissing the action against the state officers.

1. Is this action asserted against officials of the state or is it an action brought directly against the state itself?

The court of appeals held that the state officers named in the complaint were the real parties in interest, citing the rule of *Ex parte Young*. The court reasoned that "[b]ecause the state is unable to act in violation of federal law, declaratory relief that determines what federal law is and requires state officials to act accordingly cannot be considered relief against the state." 42 F.3d at 1255, Pet. App. at 22. Such rote recital of *Ex parte Young* fails to inquire far enough, however. In determining whether an action is barred by the Eleventh Amendment, this Court

has stated that it will "look to the substance rather than to the form of the relief sought, and will be guided by the policies underlying the decision in *Ex parte Young*." *Papasas v. Allain*, 478 U.S. 265, 279 (1986) (citations omitted).

A review of the complaint filed in this action leaves no doubt that the entire focus of this action is to obtain a ruling defeating Idaho's title to the submerged lands at issue. In addition to the state officers, the complaint names the state, the state board of land commissioners, and the state department of water resources as defendants. Resp. App. at 4. The complaint states that "the action seeks to quiet the Coeur d'Alene Tribe of Idaho's title in the beds, banks and waters at issue herein, declare that they are for the exclusive use and occupancy and quiet enjoyment of the Coeur d'Alene Tribe and its members and enjoin the defendants from taking any action in violation of those rights." Resp. App. at 4-5. The primary relief sought is quieting of the Tribe's asserted title, along with declaratory relief of such title. Resp. App. at 13. The injunctive relief that the Tribe seeks is not tailored to enforcement of allegedly unconstitutional state statutes by state officers; rather, it seeks to enjoin *all* defendants, including the state and the agencies, from "regulating, permitting or taking any action in violation of the plaintiffs' rights of exclusive use and occupancy, quiet enjoyment and other ownership interest." Resp. App. at 14.

Read in its entirety, it is clear that the injunctive relief sought against the officers is ancillary to and integral with the relief sought directly against the state. Even if the action against the officers can be artificially separated from the remainder of the complaint, the primary purpose of the complaint remains unchanged: to conclusively

establish the Tribe's alleged title to the disputed submerged lands vis-à-vis the state of Idaho.

The court of appeals' conclusion that the Eleventh Amendment is not violated by allowing "all relief other than relief that would foreclose the State's claim in future judicial proceedings" is especially troubling, because it ignores the nature of a sovereign's interest in submerged lands. Sovereign title to submerged lands has two facets: *jus privatum*, the legal title to such lands, and *jus publicum*, the right to exercise dominion over the lands for the public benefit. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). The court of appeals' decision would purport to leave undecided the state's legal title, but would allow relief prohibiting state officers from managing the lands for the public benefit. Such adjudication reaches the very core of state sovereignty, and is, if anything, even more intrusive than adjudication of the state's legal title. Under the common law, legal title to submerged lands was the lesser component, and in fact could be vested in someone other than the Crown. Even when granted to private parties, however, title to submerged lands continued to be charged with the rights of the public, *jus publicum*, and was held subject to the public rights of navigation and fishing. *Id.* at 12-13. Thus, the most critical component of sovereign title to submerged lands is the sovereign's authority to manage and control such lands for the public benefit. Any relief decreeing that state officers cannot manage and control submerged lands necessarily adjudicates the most critical aspect of the state's sovereign title, *jus publicum*, and is prohibited by the Eleventh Amendment.

Moreover, it is fantasy to pretend that the relief sought by the Tribe will not adjudicate the state's legal title to the disputed lands. It is true that strict principles of *res judicata* may not apply when the state is not a nominal party to a suit determining title to disputed property. Nonetheless, any disposition in this case in favor of the Tribe will be a practical bar to further assertions of state legal title. A decision by a federal district court adjudicating title to be in the Tribe, once confirmed by the court of appeals, would be precedent for all future actions. For all practical purposes, the state would be forever foreclosed from asserting its sovereignty over the disputed property.

2. Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights?

Some of this Court's early decisions, such as *United States v. Lee*, 106 U.S. 196 (1882), seemed to adopt a general rule allowing plaintiffs to proceed against government officers whenever it was alleged that the officers were in wrongful possession of disputed property. *Lee* has been limited, however, by a number of cases, primarily *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). In *Larson*, the Court was presented with a suit against the War Assets Administrator to enjoin him from selling coal that the plaintiff claimed pursuant to contract. The plaintiff, citing *Lee* and other cases, argued that government officials may be sued whenever it is alleged that they hold specific property to which the plaintiff has title, since such action is illegal as a matter of general law

and therefore beyond the official's authority, making the official amenable to suit as an individual. The Court held that the *Lee* decision circumvents sovereign immunity "[o]nly where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation." 337 U.S. at 697. The Court also held that suits against officers are allowed where the act alleged is beyond the authorities conferred on the officer by statute, so that the officer's actions "are ultra vires his authority and therefore may be made the object of specific relief." *Id.* at 689. *Larson* brought officer suits within the general principles established in *Ex parte Young*, 209 U.S. 123 (1908), where the Court held that when a state officer is seeking to enforce an unconstitutional statute, he is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160.

Since this Court's decision in *Larson*, the minimum threshold for retention of disputes over property in the possession of state officers is that the complaint make out a "claim that the holding constitutes an unconstitutional taking of property without compensation." *Malone v. Bowdoin*, 369 U.S. 643, 648 (1962), quoting *Larson*, 337 U.S. at 697. In the alternative, the complaint must allege that the officers' conduct exceeds the authority delegated to the officers by the state. If such a claim is made, "it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies." *Larson*, 337 U.S. at 690. Where the plaintiff fails to advance such claims, the action is "rightly dismissed" as an action which "in substance and effect" is one against the sovereign. *Malone*, 369 U.S. at 648.

The Tribe's complaint fails to allege harm within either prong of the *Larson* test. The complaint merely alleges as follows:

Defendants' statutes, ordinances, regulations, actions and usages unlawfully purport to regulate, authorize, use or otherwise affect beds and banks and waters at issue herein in violation of the plaintiffs' rights of ownership, including the right of exclusive use and occupancy and the right of quiet enjoyment.

Complaint, Resp. App. at 10.

The Tribe's complaint fails the first prong of the *Larson* test because it fails to expressly allege an unconstitutional taking of property. The complaint also fails the second prong of the *Larson* test. Nothing on the face of the complaint alleges that the state officers are acting outside the scope of the authority conferred on them by state statutes. The complaint merely asserts that the state statutes "unlawfully" purport to regulate the disputed submerged lands. Under *Larson*, the mere allegation that an officer "wrongfully holds property to which the plaintiff has title" is not sufficient to establish that the officer "is not exercising the powers delegated to him by the sovereign." 337 U.S. at 693. At most, the complaint describes a case of tortious interference with alleged property rights, which, under *Larson*, is not sufficient to evade sovereign immunity. *Id.* at 695.

The Tribe's complaint is most analogous to cases where the plaintiff claims property which the officer holds under an admittedly constitutional statute, but questions the sovereign's interpretation of that statute. In such cases, the Court has dismissed the action as being

against the sovereign. For example, in *Oregon v. Hitchcock*, 202 U.S. 60 (1906), the plaintiffs sought to restrain the Secretary of the Interior and the Commissioner of the General Land Office from allotting or patenting swamp lands claimed by the state of Oregon within the Klamath Indian Reservation. Oregon claimed title to the lands under federal statutes granting to the states all "swamp and overflowed lands" within their respective limits. *Id.* at 61. The federal defendants denied that the statutes applied to the disputed lands. The Court, in ordering dismissal of the action, quoted the following language from *Minnesota v. Hitchcock*, 185 U.S. 373 (1902):

Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, - to divest the government of its title, and vest it in the state. The United States is, therefore, the real party affected by the judgment, and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a state is to be determined, not by the fact of the party named as a defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question

of the effect of the judgment or decree which can be entered.

202 U.S. at 69.

The Court reached the same result in *Louisiana v. Garfield*, 211 U.S. 70 (1908). The state of Louisiana sued the Secretary of Interior and the Commissioner of the General Land Office to establish the title of Louisiana to certain swamp lands and "to enjoin the defendants against carrying out an order making a different disposition of the lands." *Id.* at 74. The state alleged that title had passed to it by reason of a congressional act purporting to "grant to the state of Louisiana the whole of the swamp and overflowed lands therein." *Id.* The federal government retained the lands on the basis that they did not pass to the state because they had been previously withdrawn for use as a military reservation. *Id.* The Court held that the case could not proceed against the officers, since the "United States might, and undoubtedly would, deny the fact of such possession, and that fact cannot be tried behind its back." *Id.* at 78. Thus, the Court dismissed all aspects of the case, including the requested injunctive relief. *Id.*; see also *New Mexico v. Lane*, 243 U.S. 52, 58 (1917) (barring suit against Secretary of Interior and Commissioner of the General Land Office to establish the state's title to certain lands and enjoin the defendants from issuing a third party a patent to the disputed lands "on the ground that the suit is one against the United States").

The latest decision in this line of cases is *Malone v. Bowdoin*, 369 U.S. 643 (1962), a common law action of ejectment brought against an officer of the United States

Forest Service. The United States held title to the disputed lands, but the plaintiff claimed that the grant to the United States was ineffective because the grantor held only a life estate in the property. *Id.* at 644 n.2. The Court noted that in *Oregon v. Hitchcock*, *Louisiana v. Garfield*, *New Mexico v. Lane*, and other cases "it was held that suits against government agents, specifically affecting property in which the United States claimed an interest, were barred by the doctrine of sovereign immunity." 369 U.S. at 646. The Court went on to dismiss the suit "as an action which in substance and effect was one against the United States without its consent." *Id.* at 648.

The above cases establish the principle that in disputes over ownership and possession of property, sovereign immunity bars actions for injunctive relief against government officers where the dispute centers on the interpretation of an otherwise constitutional statute, contract or other instrument. Where both the plaintiff and the officer claim the property under color of law, the fiction that the officer's conduct can be separated from that of the government simply cannot be maintained because of the impossibility of granting the requested relief without adjudicating the validity of the government's claims to the property.

Here, the basis and authority for the officers' possession of the disputed lands rests on the federal statute admitting Idaho into the Union on an equal footing with every other state. It is beyond dispute that it was within Congress' constitutional powers to admit Idaho into the Union. It is also beyond dispute that under the Constitution, such admission carries with it title to all submerged lands, unless Congress acted to convey the lands prior to

statehood. The pleadings before the Court therefore do not describe a situation where state officers are conducting themselves in an allegedly unconstitutional manner; rather, they describe a dispute where each side's claim is based on differing interpretations of the federal statute admitting Idaho into the Union and the federal actions creating the Coeur d'Alene Reservation. Thus, this case is most like *Oregon v. Hitchcock*, *Louisiana v. Garfield*, and similar cases, where the disputes between the claimants and the defendants were based on differing interpretations of federal statutes affecting the disposition of property. In such cases, the action of the officer cannot be artificially separated from the authority of the state, and sovereign immunity applies.

3. Is the relief sought by plaintiff permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury"?

In *Treasure Salvors*, the plurality determined that the relief was not analogous to a retroactive award because it "did not seek any attachment of state funds and would impose no burden on the state treasury." 458 U.S. at 698. It also relied on the fact that "[i]n this case *Treasure Salvors* is not asserting a claim for damages against either the State of Florida or its officials." *Id.* at 699. Likewise, in this case, the court of appeals relied on the fact that the Tribe "is not seeking damages or restitution for past wrongs, nor is it seeking to rescind a past transfer of property." 42 F.3d at 1255, Pet. App. at 22 (citations omitted).

This Court, however, has warned against such a narrow focus on the lack of burdens on the state treasury. In *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), this Court stated that "we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question of whether the suit is barred by the Eleventh Amendment." *Id.* at 1124. As the Court noted there, the "Eleventh Amendment does not exist solely to 'preven[t] federal court judgments that must be paid out of a State's treasury,' it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Id.*, quoting *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. ___, 115 S. Ct. 394, 404 (1994), and *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The "line between permitted and prohibited suits will often be indistinct." *Papasan v. Allain*, 478 U.S. 265, 278 (1986). "In discerning on which side of the line a particular case falls, we look to the substance rather than to the form of the relief sought, and will be guided by the policies underlying the decision in *Ex parte Young*." *Id.* at 278-79 (citations omitted).

Some of those policies are as follows:

Young's applicability has been tailored to conform as closely as possible to those specific situations in which it is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" Consequently, *Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal

law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation.

Papasan v. Allain, 478 U.S. 265, 277-78 (1986) (citations omitted).

The relief sought by the Tribe in this case fails to fulfill such policies for two reasons. First, as discussed above, the underlying authority for the officers' possession of the disputed submerged lands is not a state statute, but rather the federal act admitting Idaho into the Union on an equal footing with all other states. Thus, there is no "necessity" in this case for allowing the intrusion of federal judicial power on the sovereignty of the state, since there would be no vindication of federal versus state authority.

Second, even if one can make out a case for violation of federal law, such violation occurred over a century ago. The true crux of the Tribe's action is not the ongoing management of the submerged lands by state officers: it is the state's assumption of sovereignty over the disputed lands on July 3, 1890. The harm alleged by the Tribe is the result of that single, discrete act. If the Tribe were to proceed against the state officers, the essence of its action would be to rescind the state's assumption of sovereignty over the disputed submerged lands and return the lands to the Tribe. After a century of state ownership, including judicial decisions confirming the state's title, *Kootenai*

Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1088 (Idaho 1983), the Tribe's action is most analogous to retroactive relief and is barred by the Eleventh Amendment.

II. CLAIMS TO SUBMERGED LAND BASED SOLELY ON EXECUTIVE ORDERS FAIL TO STATE A CAUSE OF ACTION BECAUSE THE PRESIDENT MAY NOT CONVEY SUBMERGED LANDS TO INDIAN TRIBES WITHOUT EXPRESS CONGRESSIONAL AUTHORIZATION.

The equal footing doctrine is a fundamental guarantee of sovereignty to all states. A critical component of state sovereignty is the control and management of submerged lands. As discussed above, federal policy was to hold submerged lands within territories in trust for future states. Although this Court has recognized that Congress, with its plenary authority over territories under the Property Clause, may convey submerged lands to third parties prior to statehood, it has also recognized that congressional policy placed severe limitations on when such conveyances could be made. The question presented in this case is whether the President is vested with the authority to circumvent such congressional policies by conveying submerged lands to Indian tribes without express congressional authorization.

The Coeur d'Alene Tribe alleges that title to the disputed submerged lands was reserved for the benefit of the Tribe in an executive order issued November 8, 1873. The executive order was issued pursuant to the President's general authority, not pursuant to a specific delegation of congressional authority. The court of appeals'

opinion assumed that executive order reservations created for the benefit of Indian tribes are indistinguishable from congressional conveyances of submerged lands to Indian tribes. 42 F.3d at 1256, Pet. App. at 25-26. In doing so, the court of appeals ignored decisions from this Court limiting the interests transferred to Indian tribes by executive orders and requiring congressional action in order to defeat a state's equal footing title to submerged lands. The court's opinion denies Idaho, without reason or analysis, the protections embodied in over 200 years of congressional policy as confirmed by this Court's decisions.

The court of appeals first erred by assuming that the President has inherent authority to defeat a state's equal footing title. This Court has repeatedly emphasized that the authority to defeat a state's equal footing title is vested in Congress. The source of Congress' authority is the Property Clause, which vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." U.S. Const., Art. IV, § 3, cl. 2. Congress' authority over submerged lands derives not from the mere ownership of federal property, but from the fact that it exercises sovereignty over territories:

By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in territorial condition. . . .

We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

Utah Div. of State Lands v. United States, 482 U.S. 193, 196-97 (1987), quoting *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). Thus, the authority to grant submerged lands to third parties is firmly rooted in Congress' powers under the Property Clause. Repeated decisions of this Court confirm that the authority over public lands vested in Congress by the Property Clause is exclusive. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917). Absent a specific delegation of congressional authority, the President could no more grant submerged lands to third parties than the President could admit states into the Union.

Congress has never undertaken a general delegation of its authority to convey submerged lands. In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), this Court did find that Congress, by a long-term pattern of acquiescence to presidential actions, had implicitly delegated to the President the authority to withdraw portions of the public domain from settlement. *Id.* at 469-74. The basis for the Court's holding, however, demonstrates that this implicit delegation is limited in effect. The Court held

that implicit delegation was proper because "the land laws are not of a legislative character in the highest sense of the term, . . . 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.' " *Id.* at 474, quoting *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905). While such reasoning may apply to routine land dispositions, it has no application to acts alleged to defeat a state's equal footing title. As this Court has often noted, Congress has "never undertaken by general land laws to dispose of land under navigable waters." *Utah Div. of State Lands*, 482 U.S. at 197. Instead, congressional policy was "to dispose of sovereign lands only in the most unusual circumstances." *Id.* In other words, dispositions of submerged lands are of a "legislative character," and are not subject to delegation by acquiescence. Even an express delegation of authority to the President to permanently reserve submerged lands would have to be specific and unambiguous. In discussing the extent of the authority delegated to the Secretary of Interior to designate Indian reservations in Alaska, the Court stated that "a statute that authorizes permanent disposition of federal property would be most strictly construed to avoid inclusion of fisheries by implication." *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 104 (1949).

Moreover, the only delegation of authority confirmed in *Midwest Oil* was the authority to withdraw lands open to disposition under the general land laws:

[The President] has, during the past eighty years, without express statutory authority, – but under the claim of power to do so, – made a multitude of Executive orders which operated to

withdraw public land that would otherwise have been open to private acquisition.

Midwest Oil, 236 U.S. at 469 (emphasis added). As this Court noted in *Utah Div. of State Lands*, submerged lands were "exempt from sale, entry, settlement, or occupation under the general land laws." 482 U.S. at 203. Thus, by limiting its holding to lands otherwise open to private acquisition, the *Midwest Oil* decision applies only to uplands, and does not apply to submerged lands. Indeed, this Court has never recognized a general authority on behalf of the President to effect the disposition of sovereign submerged lands.⁷

Assuming arguendo that an executive order could affect a state's entitlement to submerged lands, the court of appeals nonetheless erred by failing to distinguish between conveyances and reservations of submerged lands. The equal footing test employed in *Montana* and

⁷ Under its terms, the 1873 executive order was clearly intended to apply only to uplands. The Order, in describing the boundaries of the Reservation, provides as follows: "It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians. . . ." Executive Order of November 8, 1873, 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 837 (1904). The language recognizing that the reservation consisted only of lands "withdrawn from sale" can only be interpreted as an intention to limit the Reservation to general public lands and omit submerged lands. The term "public lands," has long been understood to mean only "such land as is open to sale or other disposition under general laws." *Bardon v. Northern Pac. R. Co.*, 145 U.S. 535, 538 (1892).

other cases addresses only those instances where an individual alleges that Congress conveyed title to him prior to statehood. Where a plaintiff alleges that a reservation of land defeats a state's equal footing title, a more stringent test is required, as this Court explained in *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987):

When Congress intends to convey land under navigable waters to a private party, of necessity it must also intend to defeat the future State's claim to the land. When Congress reserves land for a particular purpose, however, it may not also intend to defeat a future State's title to the land. The land remains in federal control, and therefore may still be held for the ultimate benefit of future States.

482 U.S. at 202. The Court went on to hold that "[a]ssuming arguendo that a reservation of land could be effective to overcome the strong presumption against the defeat of state title," the United States would have to show congressional intent to include submerged lands within a reservation and "would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land." *Id.*

Because of the crucial difference between conveyances and reservations, the court of appeals erred by not critically examining the nature of the federal act creating the original Coeur d'Alene Reservation to determine whether it could be construed, as a matter of law, as a conveyance of title to the Tribe. In fact, the court ignored long-standing decisions of this Court holding that the President has never been delegated general authority to "convey" federal properties to Indian tribes.

In *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), this Court reviewed the delegation "to withdraw public lands from sale" as found in *Midwest Oil*, and addressed "whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians." *Id.* at 326. The Court found it "significant that the executive department consistently indicated its understanding that the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations." *Id.* at 327. After reviewing this and other indications of congressional intent, the Court concluded that Congress had never delegated authority to the President to convey reservation lands to Indian tribes. *Id.* at 331. Thus, executive orders designating reservations "were effective to withdraw from sale the lands affected and to grant the use of the lands to the [tribe]." *Id.* Tribes residing on executive order reservations are "tenants at the will of the Government" who hold "a mere temporary and cancelable possessory right." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176, 178 (1947).

If the President cannot convey uplands to Indian tribes, it is axiomatic that he cannot convey submerged lands held in trust for future states. Thus, the court of appeals erred when it assumed that executive orders establishing Indian reservations may "convey" title to Indian tribes, including title to submerged lands.

In conclusion, the court of appeals erred when it analogized executive order reservations to reservations established by Congress. From 1873 to 1891, the date that

Congress formally established the Coeur d'Alene Reservation, the Tribe held only a tenancy at will to reservation lands. During that time, the federal government retained full legal title to the disputed submerged lands. Thus, establishment of the Coeur d'Alene Reservation was not inconsistent with the notion of continued federal trusteeship of the submerged lands for the future state of Idaho. For purposes of a 12(b)(6) motion, such continued federal trusteeship must be presumed unless the plaintiff identifies a federal action that could conceivably be sufficient to defeat the state's title. Because the Tribe failed to allege any federal action that can, as a matter of law, be regarded as sufficient to defeat Idaho's title to the submerged lands, the district court properly dismissed those portions of the Tribe's complaint based on the executive order. Even assuming *arguendo* that an executive order could ever defeat a State's entitlement to submerged lands, the issue of title under the executive order should be remanded to the court of appeals and the district court for further factual findings with directions that the Tribe's claims must be denied unless the Tribe carries its burden under *Utah Div. of State Lands* of proving that the executive order was "affirmatively intended" to defeat Idaho's title to the disputed submerged lands.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals allowing the Coeur d'Alene Tribe to obtain a decree of its alleged title to the disputed waters and submerged lands, and injunctive relief ordering state officers to act in accordance with such title, should be reversed. Additionally,

those portions of the judgment holding that the executive order establishing the Coeur d'Alene Indian Reservation may be sufficient to convey the disputed submerged lands to the Tribe should be reversed.

Respectfully submitted,

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No. 94-1474

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1995

IDAHO, et al.,

Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED

1. The Eleventh Amendment bars federal courts from hearing quiet title actions brought by Indian tribes against a state to adjudicate title to, and gain possession of, waters and submerged lands held by the state under the equal footing doctrine of the United States Constitution. The issue presented by this case is whether a federal court may nonetheless hear an action against state officers for injunctive and declaratory relief when such relief requires adjudication of the state's equal footing title and will deprive the state of all practical benefits of ownership of the disputed waters and submerged lands.

2. The President, absent an express delegation of Congress' exclusive authority over public lands, cannot convey title of uplands to Indian tribes. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). The issue presented in this case is whether the President, acting without express congressional authority, can nonetheless convey title of the beds and banks of navigable waters to an Indian tribe, thereby defeating a state's entitlement to such lands under the equal footing doctrine of the United States Constitution.

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CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. art. VI, cl. 2.

All other constitutional and statutory provisions are contained either in Petitioner's Brief or the Appendix to this brief.

◆

STATEMENT OF THE CASE

This case originated as a boundary dispute between two sovereigns - a sovereign Indian tribe, the Coeur d'Alene Tribe and its officials (hereafter Tribe or tribal officials), and a sovereign state - the state of Idaho, its departments and officials (hereafter Idaho or Idaho officers). The Complaint sought: (1) the ownership of the beds and banks of various navigable watercourses (Lake Coeur d'Alene and portions of the Coeur d'Alene, St. Joe and Spokane rivers);¹ and (2) the right or jurisdiction to regulate and use those waters. It is similar to disputes

¹ The State officers have referred to the beds and banks of the navigable watercourses as "submerged lands." The Tribe will use the same term.

this Court often hears between two states regarding ownership of a river which forms their boundary.

There are two recurring themes which seem to impact every aspect of this case. The first is that the dispute is now between a sovereign and the officers of another sovereign. It is not a dispute between a citizen and sovereign. The second theme is the premature procedural posture of this case. The action is only at the Fed.R.Civ.P. 12(b) Motion to Dismiss stage. The only record is the Complaint and the Motion to Dismiss.² Brief in Opposition to Petition for Writ (Br. in Opp.) App. 3, 15.

The district court dismissed Idaho and the Idaho departments completely and dismissed the Idaho officers as to declaratory judgment and quiet title claims on Eleventh Amendment grounds. Pet. App. at 32-40. The district court found that it would have jurisdiction to enjoin the Idaho officers if they were violating federal law under *Ex Parte Young*, 209 U.S. 123 (1908). Pet. App. at 40.

The district court then proceeded most unusually. It went to the merits of the case in a Fed.R.Civ.P. 12(b) motion. Without any factual record, the district court ruled that the Tribe and tribal officials had not overcome the "strong presumption" of *Montana v. United States*, 450 U.S. 544 (1981). Pet. App. at 46-47. The case was dismissed. Pet. App. at 49.

² "On a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lewis v. Casey*, No. 94-1511, 1996 WL 340797 (1996).

The court of appeals affirmed in part and reversed in part. The court of appeals affirmed as to the dismissal of Idaho and the Idaho departments.³

The court of appeals reversed as to the Idaho officers. First it carefully limited the relief that could be available. The court of appeals held that if the trial court found the property belonged to the Tribe, it could enjoin Idaho officers from violating any rights of the Tribe. It could also declare the Tribe to be the owner "against all claimants except the State of Idaho and its agencies." Pet. App. at 22. It then rejected Idaho's argument on the merits and remanded the case for trial, stating: "As it is conceivable that the Tribe could prove facts that would entitle it to the relief sought [against the state officers only], dismissal for failure to state a claim was error." Pet. App. 27.

The court of appeals also remanded for trial the aboriginal title count of the Complaint which it found that the trial court had improperly dismissed without discussion. Pet. App. at 28.

³ The court of appeals rejected the Tribe's argument: (1) that a state can define its own sovereignty any way it wishes, (2) that Idaho had defined its sovereignty in a limited way as a result of Idaho Supreme Court holdings that actions to quiet title were actions against the property not against the sovereignty of the state, and (3) that consequently the Eleventh Amendment was no bar to such an action against Idaho because the Eleventh Amendment protects a state's sovereignty and this suit was not against the states' sovereignty. The Tribe cross-petitioned for certiorari on this issue, but that cross-petition was denied. *Roddy v. State*, 139 P.2d 1005 (*Id.* 1943); *Lyon v. State*, 283 P.2d 1105 (*Id.* 1995) Pet. App. 7-8.

The action against Idaho and its departments is over, although the Complaint still contains those allegations. What remains of the suit is declaratory and injunctive relief against Idaho officers to stop their violation of federal law (acting in violation of the Tribe's federal rights of ownership) and to quiet the Tribe's title against the world other than Idaho and its departments. Pet. App. 5-7.

Normally a Statement of the Case would contain a recital of the applicable facts. But here there is no factual record, only a Complaint and briefs regarding the Motion to Dismiss.

There is, however, the opportunity to view the Federal Energy Regulatory Commission's (F.E.R.C.) treatment of the facts on the underlying issue. In 1973 the Tribe intervened in a F.E.R.C. licensing proceeding to seek compensation for a utility's water storage on Lake Coeur d'Alene. Following a hearing, the F.E.R.C. in 1983 ruled that the Tribe owned the beds and banks of the southern portion of Lake Coeur d'Alene. 1983 WL 37712 (F.E.R.C.). Later, in 1988 the F.E.R.C. ruled that it did not have jurisdiction to make such an ownership determination. 1988 WL 244511 (F.E.R.C.).

The F.E.R.C. determination of tribal ownership is not determinative in any way. It is not part of the record of this case. But it is illustrative of *some* of the underlying facts just as the factual discussion regarding the Crow Tribe's interest in the Big Horn River in *United States v. Finch*, 548 F.2d 822 (reversed on other grounds) was considered in *Montana v. United States*, 544, 554-555. The F.E.R.C. is the only impartial decision-maker to consider

the merits of this case and view the evidence there presented in relation to the law. It is simply appropriate to inform the Court of this case in which the Tribe prevailed until the jurisdictional determination.

Finally, it is appropriate to note that the United States, as the Tribe's trustee, has filed suit against Idaho regarding ownership of a portion of Lake Coeur d'Alene and a portion of the St. Joe River. The issues and area at issue in that action are less than the Tribe's suit which covers almost all of Lake Coeur d'Alene and portions of the Coeur d'Alene and Spokane rivers. The Tribe has been granted intervention status, but the scope of the Tribe's Complaint in Intervention is limited to the area at issue in the United States' suit. *U.S. and Coeur d'Alene Tribe v. Idaho*, U.S. Dist. Ct. #CIV-94-0328-N-EJL, November 9, 1995 Order.

SUMMARY OF ARGUMENT

The Eleventh Amendment caselaw developed during the past century by this Court serves a critical purpose in this nation's Constitutional government. The thoughtfully crafted approach embodied in *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny honors the sovereignty of our states through its narrowly tailored exception to immunity from suit. At the same time the doctrine gives life to the Supremacy Clause. Disputes periodically arise between states and others, and when they involve the infringement of federally protected rights by state officials, the *Ex Parte Young* doctrine opens the federal court doors for their resolution.

The Ninth Circuit Court of Appeals correctly determined that the Coeur d'Alene Tribe's claim seeking to prevent Idaho's officers from acting contrary to its federally recognized ownership rights in Lake Coeur d'Alene is maintainable under the *Ex Parte Young* doctrine. This Court in 1897 held real property cases against state officers were not barred by the Eleventh Amendment, *Tindal v. Wesley*, 167 U.S. 205 (1897), and last decade held personal property cases also were not prohibited by Eleventh Amendment immunity. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). After examining the breadth of caselaw in this area, the *Treasure Salvors* decision identified a three part analysis for ascertaining the viability of claims like the Coeur d'Alene Tribe's. The Ninth Circuit Court of Appeals carefully applied these principles to determine whether the Tribe's claim met the standards of each part: the state officers are the real party in interest, their alleged conduct interferes with the Tribe's properly alleged federal rights, and the Tribe seeks permissible prospective relief.

The Tribe's possessory claim is grounded in the long history of this nation's dealings with Indian tribes and in over 130 years of specific dealings between the Coeur d'Alene Tribe and the United States. Held by the Tribe from time immemorial, Lake Coeur d'Alene was included within the boundaries of its reservation created in 1873 by Executive Order. The power to do so was vested in the President by virtue of Congress' long acquiescence in the practice. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). The effect of that reservation and its inclusion of the lake can only be decided following the factual inquiry required by *Montana v. United States*, 450 U.S. 544 (1981).

All other cases issued by this Court in connection with ownership of lands beneath navigable waterways similarly require factual inquiry. While *Montana* recognized a presumption exists that states own such lands, the presumption is rebuttable by a showing of the Tribe's and United States' intent and understanding. Numerous pre-statehood and post-statehood actions taken by Congress regarding Lake Coeur d'Alene would demonstrate the Tribe's ownership but for the current procedural posture of this case. When viewed in the light of applicable presumptions and rules of interpretation, the facts which the Tribe is entitled to present at trial will prove its claim for the requested relief.

I. THE ELEVENTH AMENDMENT DOES NOT BAR STATE OFFICERS FROM BEING SUED IN FEDERAL COURT FOR DECLARATORY AND INJUNCTIVE RELIEF TO HALT A VIOLATION OF FEDERAL LAW.

A. Federal Courts Have Jurisdiction to Enjoin State Officers From Continuing in Possession of Property if Federal Law Entitles Another to Possession.

It has long been held that federal courts have jurisdiction to enjoin state officers from violating federal law. *Ex Parte Young*, 209 U.S. 123 (1908). It has even longer been held that federal courts have jurisdiction to enjoin state officers from continuing in possession of property if federal law entitles another to possession. *Tindal v. Wesley*, 167 U.S. 204 (1897).

In the first Question Presented, the Idaho officers ask this Court to limit these rules as they relate to property,

or at least to property under navigable waters. The Eleventh Amendment Question Presented implicates the usual Eleventh Amendment conflicting concerns of federal supremacy versus state sovereignty. But it does more. It implicates the third concern of Indian tribal sovereignty and the plenary federal authority over Indian affairs that is constitutionally based. *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974) citing U.S. Const. art. I, § 8, cl. 3.

Questions involving violations of federal law by state officers should be resolved in federal courts. This Court's existing case law does not bar such federal court jurisdiction – an action against state officers involving property. Indeed, *Ex Parte Young* and *Tindal* hold the opposite, and there is no basis for changing this long standing rule which is so essential to preserving the supremacy of federal law.

By its express terms, the Eleventh Amendment bars a federal court lawsuit by a citizen of one state against another state. U.S. Const. amend. XI. Nearly 100 years ago, Mr. Wesley, a citizen of New York, filed in South Carolina federal court against Mr. Tindal, the Secretary of State of South Carolina, for possession of certain real property in which the state claimed an interest. *Tindal v. Wesley*, 167 U.S. 204 (1897). The case fell squarely within the black letter of the Eleventh Amendment. The state officers defended on Eleventh Amendment grounds, specifically on the theory that a suit against the officer for possession was really a suit against the state for title and that deciding the case would preclude the state in future litigation. *Id.*

This Court forcefully rejected those arguments, which are identical to arguments made by the Idaho officers in this case. *Id.* at 221, Pet. Br. at 12-26. The *Tindal* court held the suit was not against the state, and granted prospective injunctive relief. *Tindal*, 167 U.S. at 223.

A few years before *Tindal* this Court had issued *Hans v. Louisiana*, 134 U.S. 1 (1890), which began the expansive sweep of the Eleventh Amendment far beyond its actual words to provide states broad immunity from suits in federal court. The basis of this expanded immunity from suit in federal court was the state's sovereignty. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1122 (1996) citing *Hans v. Louisiana*, 134 U.S. 1 (1890). But the Court soon saw the threat that this broad new immunity posed to the supremacy of federal law. Seeking a way to balance the Constitutional requirement of supremacy of federal law with this respect for state sovereignty, the Court turned to the officer suit approach of *Tindal* and other cases.

In *Ex Parte Young*, 209 U.S. 123 (1908), the Court held that the Eleventh Amendment did not bar a state officer being sued in federal court for injunctive relief to halt a violation of federal law. The federal question addressed by that Court was "whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law. . . ." *Id.* at 144. The rationale was that where a state officer was acting in violation of federal law he was "stripped" of his official status and was acting as a private individual. *Id.* at 159.

A workable balance was thus found which respected state sovereignty and ensured the supremacy of federal law. The *Ex Parte Young* officer suit doctrine has been

much refined over the years, but its balanced maintenance of federal supremacy has stood the test of time. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) ("... the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'") (quoting *Ex Parte Young*); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982) ("If the Constitution provided no protection against such unbridled [state officer] authority, all property rights would exist only at the whim of the sovereign [state]."); *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the Supremacy Clause."). *Ex Parte Young*'s viability was most recently reaffirmed in *Seminole Tribe*, although the doctrine was found to be inapplicable because of the unique statutory scheme in that case. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. at 1114, n.14.

Another line of officer suits regarding property has developed regarding federal officers. *United States v. Lee*, 106 U.S. 196 (1882). See also *Block v. North Dakota*, 461 U.S. 273 (1983); *Malone v. Bowdoin*, 369 U.S. 643 (1969); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). The thrust of these federal officer suit cases is that the suit is maintainable if the federal officer is alleged to be violating the constitution or exceeding his federal statutory authority. See *Larson*, 337 U.S. at 690; *Malone*, 369 U.S. at 647. But, if there is an adequate federal remedy, such as the Quiet Title Act in *Block*, then the suit against the officer cannot be maintained because of federal sovereign immunity. See *Block*, 461 U.S. at 277.

The Idaho officers imply that state officer suits regarding property are cut from the same cloth as federal officer suits regarding property. Pet. Br. 11-12, n.3. But they are not. The two rest on vastly different jurisprudential foundations.

Federal officer suits regarding property are based upon the need to provide a remedy to enforce the Fifth Amendment's protection of property.⁴ See *Larson*, 337 U.S. at 690. The federal officer suit was the vehicle used to balance federal sovereign immunity against the individual's need for a remedy to enforce the constitutional property protections.

While state officer suits regarding property in federal court sometimes may share this same remedy concern if not provided under state law, their primary basis for providing federal court jurisdiction is insuring the constitutional requirement of the supremacy of federal law.⁵ *Ex Parte Young*, 209 U.S. 123 (1908).

Unlike the federal officer suits, the adequacy of a state court remedy has never been a basis for denying federal court jurisdiction in state officer suits under the *Ex Parte*

⁴ "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

⁵ "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; . . ." U.S. Const. art. VI, cl. 2.

Young doctrine, nor should it be.⁶ The jurisprudential heart and soul of the *state* officer suit is maintaining the supremacy of federal law. Without it, the *Hans* expansion of the Eleventh Amendment would be unchecked, posing a serious threat to the delicate balance of sovereignties that has served this country so well for so long.

Four relatively recent cases form the present analytical basis for resolving disputes with state officers regarding property. They are *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89 (1984); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); and *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). All four will be discussed in detail in the next sections which address the Idaho officers' Eleventh Amendment arguments.

⁶ The Idaho officers and amici Council of State Governments (Council) argue that the quiet title remedy provided by Idaho Code § 5-328 (1959) removes the justification for providing federal court jurisdiction. This is not so. The primary basis underlying jurisdiction in the *state* officer suit is insuring the supremacy of federal law, not providing a remedy. Pet. Br. p. 26, n. 6; Amicus Brief of the Council of State Governments at 15-19. When presented with a similar argument in the past, this Court stated: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

B. This Case Satisfies the Three Pronged Jurisdictional Test Under the *Ex Parte Young* Doctrine.

The court of appeals carefully followed this Court's analysis of the *Ex Parte Young* doctrine as refined in *Treasure Salvors* and *Pennhurst*. Pet. App. 14-23. After holding that the suit could not be maintained against the state or state agencies, it held that the Tribe's claims for declaratory and injunctive relief were properly maintainable against the Idaho officers in federal court. The officers have taken exception with each prong of the court of appeals' determination under the *Treasure Salvors/Pennhurst* analysis.

1. First Prong: State officers are the proper party.

The first prong of the *Treasure Salvors/Pennhurst* analysis addresses who is the real party in interest. If the real party in interest is the state, the suit is barred by the Eleventh Amendment. If the real party in interest is the state officer, it is not barred. The court of appeals properly determined that the Tribe had alleged that tribal ownership was based on federal law and that the Tribe had further alleged the Idaho officers were attempting to regulate the Tribe's beds, banks and waters in violation of that federal law. It properly concluded that the officers were the real parties in interest because they were alleged to be doing the regulating sought to be enjoined.

The Idaho officers argue that the state is really the defendant and cite to the Complaint showing that relief was requested against the state itself. Of course it was.

The Tribe sued the state under the theory that because Idaho had defined its sovereignty narrowly as to property a federal court action to quiet title to property did not impact state sovereignty. Thus the suit was not barred by the Eleventh Amendment. *Roddy v. State*, 139 P.2d 1005 (*Id.* 1943); *Lyon v. State*, 283 P.2d 1105 (*Id.* 1955). The court of appeals rejected the Tribe's argument, Pet. App. 7-8, and certiorari was denied on the Tribe's petition. 116 S.Ct. 585 (1995). The Complaint would have been properly amended on remand to remove those allegations against the state, but instead certiorari was granted on this petition of the Idaho officers.

The essential inquiry is whether the injunctive relief can be divorced from title. It can. That is exactly what was done 100 years ago in *Tindal*. That is what was done in *Treasure Salvors*. That is what was done in the federal officer suits regarding property. That is what the court of appeals carefully did here, holding title could not be quieted against the state or state agencies, but that the federal court could grant declaratory relief confirming the tribe's title against everyone other than the state and its agencies, and could enjoin the Idaho officers. The *Ex Parte Young* doctrine is based on the premise that the state and its sovereignty is not implicated when a federal court enjoins a state officer from violating federal law.

The Idaho officers also argue that the state should be considered the real party because it is submerged lands that are being regulated and regulation of submerged lands is tied to sovereignty. As discussed above the submerged lands are just as important to the Tribe's sovereignty. Furthermore all cases under the *Ex Parte Young* doctrine impact important state sovereignty interests in

some way. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (attachment of personal property held by state); *Quern v. Jordan*, 440 U.S. 332 (1979) (operation of state programs); *Milliken v. Bradley*, 433 U.S. 267 (1977) (disbursal of state funds); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (administration of state national guard); *Ex Parte Young*, 209 U.S. 123 (1908) (power to enact state law); *Tindal v. Wesley*, 167 U.S. 205 (1897) (possession of real property held by state). Property cases are not unique.

Finally, the Idaho officers argue that a judgment will operate against the state because Idaho in fact owns Lake Coeur d'Alene. Saying that Idaho owns the lake does not make it so. If Idaho wants to come into federal court to claim ownership, it can. But until it does, the federal question before the court is simply the Tribe's ownership interest against the rest of the world other than Idaho and its agencies. The court of appeals properly found that the Tribe had satisfied the first prong of the analysis.

2. Second Prong: Tribe properly alleges ongoing violation of federal right.

The second prong of the *Treasure Salvors/Pennhurst* analysis considers the basis on which the officers' conduct is challenged. If the officers' conduct is a violation of federal law, or wholly unauthorized by state law, it is actionable in federal court. If the officers' conduct is merely tortious or *ultra vires* of his authorized state law duties, it is not. The court of appeals properly determined that the Tribe's Complaint had alleged an ongoing violation of a federal right sufficient to come within the *Ex Parte Young* doctrine. Pet. App. 13-14.

The Idaho officers argue from the *federal officer* line of suits regarding property that the Tribe's Complaint is insufficient as really only challenging tortious conduct. Further the Idaho officers argue from these and other *federal officer* suit cases that the case is really only a dispute over the interpretation of an admittedly constitutional federal statute. Pet. Br. 3-36.

Nowhere in this case is the Idaho officers' misunderstanding of the applicable law and its jurisprudential basis more clearly evident than in regard to the second prong of the *Treasure Salvors/Pennhurst* test. The Idaho officers start from the erroneous premise that *state officer* suits are just like *federal officer* suits and reach the erroneous conclusion that the Tribe's Complaint must be pled as if this were a federal officer suit. Pet. Br. 12 n.3, 30-36.

State officer suits are entirely different than their federal counterparts. The jurisprudential underpinning of *state officer* suits is balancing state sovereign immunity against the need for maintaining the supremacy of federal law. U.S. Const. art. VI, cl. 2. *Ex Parte Young*, 209 U.S. at 159-160. The jurisprudential underpinning of the *federal officer* suits is balancing federal sovereign immunity against the need to provide a remedy for violations of Fifth Amendment protection of property. *United States v. Lee*, 107 U.S. at 218.

A *state officer's* violation of a right secured by federal law is sufficient for this second prong of the *Treasure Salvors* analysis because of the need for the supremacy of federal law. *Treasure Salvors*, 458 U.S. at 685. *Pennhurst*, 465 U.S. at 105. See also U.S. Const. art. VI, cl. 2. But a *federal officer* suit is different. A violation of federal law is

not always sufficient. The claim must be for a constitutional taking or an explicit allegation of specific excedence of the officer's statutory authority. *Carson*, 337 U.S. at 689-690.

A *federal officer* suit will be foreclosed where Congress provides a statutory remedy, *Block v. North Dakota*, 461 U.S. 273 (1983), but the same is not true regarding a *state officer* suit. E.g., *Tindal, Ex Parte Young*. This distinction stems directly from the differing jurisprudential underpinnings of state and federal officer suits.

In *Block*, this Court found the *federal officer* suit approach to no longer be necessary in the property context since the Quiet Title Act allows suits against the United States itself. Maintaining federal supremacy as against state authority, on the other hand, must still be pursued through *state officer* suits under *Ex Parte Young*. *Pennhurst* at 105.

The Idaho officers alleged that the Tribe's Complaint does not satisfy the *federal officer* suit standard. The Tribe's Complaint is well pled. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-667 (1974) (threshold allegation for a possessory action is the right to possession).

Petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits. . . . Given the nature and

source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both [28 U.S.C.] § 1331 and § 1362.

Id. (citations omitted). The Tribe's Complaint properly alleges Tribal ownership of the beds, banks and waters of navigable watercourses and state officer interference with that federal right. Complaint, ¶16-39, Br. in Opp. App. 7-13. There is no requirement to plead a taking or lack of remedy in a state officer suit. Even if a state wanted to "take" Indian land and pay compensation through a "state" remedy, they cannot because such is prohibited by federal statute. 25 U.S.C. § 177. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 (1985).

The Idaho officers are similarly off the mark in their analysis of a "colorable claim" approach urged by the dissent in *Treasure Salvors* for state officer suits. The dissent in *Treasure Salvors* discussed "colorable claim" solely in the context of state officer conduct *ultra vires* of state law authority. That dissent urged a standard that if the state officer conduct was being challenged because it was allegedly *ultra vires* of state law, the suit should be barred if the state officer had a colorable claim of right under state law. *Treasure Salvors* at 702-717 (White, J., dissenting).

To put it another way, a state officer suit brought under an *ultra vires* theory could only be maintained if the state officer had absolutely no state law basis on which to justify his conduct.

This approach was later adopted in *Pennhurst*. See *Pennhurst* at 107-117. *Pennhurst* made clear that an action based on conduct of a state officer that was *ultra vires* of his state law authority could only be maintained if there was absolutely no state law basis for the state officer's conduct. *Pennhurst* at 114 n.25. The rationale underlying the state officer *ultra vires* approach is that a general violation of state law by the state officer did not violate federal supremacy and therefore the balance tips in favor of protecting state sovereign immunity. If, on the other hand, the state officer is acting in violation of federal law, the balance tips the other way, allowing the suit to be brought in federal court to protect the supremacy of federal law.

The Idaho officers now urge this Court to adopt a "colorable claim" standard for violation of federal law in a state officer suit. The proposed standard would be that if a state officer could state a "colorable claim" as to why his conduct does not violate federal law, then the federal court suit would be barred by the Eleventh Amendment.⁷

⁷ The Idaho officers cite to *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 671 P.2d 1085 (*Id.* 1983) for the proposition that Idaho owns Lake Coeur d'Alene. The Tribe was not a party to this case and the opinion contains no discussion of tribal ownership. In fact, ownership was not even litigated but it was assumed under *Shively*. *Id.* at 1088. *Kootenai* is no more controlling on this case than is *In re The Washington Water Power Company*, 1983 WL 37712 (F.E.R.C.), reversed on jurisdictional grounds 1988 WL 244511 (F.E.R.C.), which concluded that the Tribe owned a portion of Lake Coeur d'Alene. If any non-binding case is going to be looked to to see if any party has a "colorable claim" it should be the F.E.R.C. case because it at least considered the competing claims of ownership. If so the state does not have a colorable claim.

The clearest way to appreciate the fallacy of the state officer's proposed colorable claim standard is to analyze it in terms of the jurisprudential basis of the entire line of officer suit cases under *Ex Parte Young*. The underlying question in a state officer suit is whether the supremacy of federal law can be protected under the proposed standard. The obvious answer is that the state's "colorable claim" standard does not protect federal supremacy. The supremacy of federal law is not protected if a state officer can avoid federal court review by simply asserting a "colorable claim" that he is not violating federal law.⁸

Such a standard would severely limit a federal courts' ability to ensure the supremacy of federal law. Such a standard would be the first in what would undoubtedly prove to be a long line of cases where innovative Attorneys General define every state action as "property" or "affecting sovereignty just as much as property" in an effort to totally repeal the *Ex Parte Young* doctrine. Such an approach finds no support in this Court's prior opinions. Only this year the viability of *Ex Parte Young* was specifically reaffirmed as a viable and needed remedy to ensure the supremacy of federal law. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1331, n. 14 (1996). The Idaho officers proposed "colorable claim" standard should be rejected.

The Idaho officers further argue that the supremacy of federal law is not at issue because they agree that the

⁸ In fact, Idaho's officers urge more: that the rebuttable presumption described in *Montana v. United States*, 450 U.S. 544 (1981), satisfies the "colorable claim" standard sufficient to close the federal court doors to the Tribe.

result is controlled by federal law. Consequently, they argue, we only have conflicting interpretations of federal law, not a conflict of a state and federal law. This argument also misses the point. The interpretation of these federal laws is the core of this case. Under *Ex Parte Young* and *Pennhurst* the determination of whose interpretation is correct should be conducted by the federal court, not by the state's officers. The Idaho officers are regulating based on state laws which direct them to regulate submerged lands. The dispute is between those state laws and the federal law which the Tribe alleges render the Idaho officers' regulation unlawful.

This argument is just a recycled version of their "colorable claim" argument and fails for the same reason. In practically every *Ex Parte Young* type case the state officer will be able to argue that the dispute is just over differing interpretations of federal law and that there is really no dispute between state and federal law. Such an approach would not protect federal supremacy.

3. Third Prong: Tribe seeks only prospective relief.

The third prong of *Treasure Salvors* addresses the remedy. If the remedy requested is retrospective or for damages, the suit is barred by the Eleventh Amendment. *Blatchford v. Native Village of Noatak*, 501 U.S. 755 (1991). If the remedy requested is only for prospective relief, the suit is not so barred. *Id.* at 788. *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

The court of appeals carefully implemented the principles established by this Court. It concluded that the

Eleventh Amendment barred federal courts from quieting the state's title to property in which the state claims an interest, but did not bar injunctive or declaratory relief that put a plaintiff in possession of property. Pet. App. 16. The court of appeals noted that *Tindal* made clear a remedy sought against a state officer was not barred just because the officer was in possession as a result of the state's claim of ownership. *Treasure Salvors*, 458 U.S. at 685-687, citing *Tindal*, 167 U.S. 204 (1897). Pet. App. at 15.

The court of appeals concluded its analysis by noting that the Tribe sought only prospective relief and not damages or restitution. It held that the Eleventh Amendment did bar a determination that would later preclude the state or its agencies, but did not bar a determination of tribal ownership against all others besides the state and its agencies nor did the Eleventh Amendment preclude prospective injunctive relief. Pet. App. at 21-24.

The Idaho officers argue that the case does not satisfy the policies set out in *Papasan v. Allain*, 478 U.S. 265 (1986), and is therefore barred by the Eleventh Amendment. But *Papasan* simply held that the Eleventh Amendment bars an injunction of a state officer violating state, not federal, law. More important to this case, *Papasan* also found state officer suits under *Ex Parte Young* are allowed because the need to ensure the supremacy of federal law takes precedence over state Eleventh Amendment sovereign immunity considerations. *Id.* at 292. This case is fully supported by that proposition.

The Idaho officers then argue that the Tribe's alleged ownership comes from the executive order issued over

100 years ago and the relief would constitute retroactive relief. If the Idaho officers are attempting to argue *laches*, that theory has been rejected for such cases. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). The Tribe seeks only prospective relief, or in the words of *Papasan* "relief against the state official [that] directly ends the violation of federal law." *Papasan*, 478 U.S. at 278.

The court of appeals properly applied the *Treasure Salvors/Pennhurst* three-pronged Eleventh Amendment analysis to this state officer suit regarding property. It properly limited the relief available in accordance with this Court's prior holdings. The alternative "colorable claim" standard proposed by the Idaho officers is not supported by this Court's prior holdings and cannot survive scrutiny when analyzed under the jurisprudential basis for state officer suits. The court of appeals should be affirmed.

C. Federal Court is the Proper Tribunal to Resolve Serious Disputes Between Sovereigns.

It is essential to consider the consequence of the relief requested by the Idaho officers.

If the Eleventh Amendment is held to bar federal court resolution of such important interests between sovereign tribes and sovereign states, then where will they be decided? The Idaho officers suggest state court. An equally viable forum would be tribal court. See *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (tribal courts have initial jurisdiction to consider federal questions).

The Tribe readily agrees with the Idaho officer statement that "[t]his Court has long recognized the 'problems of federalism inherent in making one sovereign appear against its will in the courts of the other. . . .'" Pet. Br. 21 citing *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring). This is a basic tenant of federalism, although the Idaho officers failed to cite the footnote in *Employees* that pointed out that such is regularly done in *Ex Parte Young* situations.⁹ But where this language from *Employees* is most applicable is where a state is forced to go into tribal court or the tribe is forced to go into state court.

If Eleventh Amendment bars the doors of the federal court in this type of situation, the practical reality is that any sovereign will use their own courts. The result would likely be conflicting default judgments without resolving anything and creating a volatile situation in the process.

This Court has developed an appropriate test in another context that could prove helpful here. In deciding whether to exercise its original discretionary jurisdiction

⁹ The footnote in *Employees* reads: "Of course, suits brought in federal court against state officers allegedly acting unconstitutionally present a different question, see *Ex Parte Young*. Likewise, suits brought in federal court by the United States against States are within the cognizance of the federal judicial power, for '(t)he submission with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' . . . but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. Moreover, it is unavoidable that in a suit between a State and the United States one sovereign will have to appear in the courts of the other." *Id.* at 294, n.9 (citations omitted).

over disputes between states, this Court has looked at the nature of the dispute and the availability of alternative forums.

'The model case for invocation of this Court's original jurisdiction is a dispute between State of such seriousness that it would amount to *casus belli* if the States were fully sovereign.' Second, we explore the availability of an alternative forum in which the issue tendered can be resolved.

Mississippi v. Louisiana, 506 U.S. 73, 77 (1992) (citations omitted) (emphasis added).

Although tribal sovereignty and state sovereignty differ in various aspects, such a test would be appropriate in a case between a sovereign Indian tribe and the officers of a sovereign state. Ownership and control of lakes and rivers would certainly be the type of dispute which would be a *casus belli* if the tribe and state were "fully sovereign." Meaningful alternative forums are not reasonably available because neither sovereign would likely go into the other's courts. The *Mississippi* test provides a good analytical basis for the exercise of federal court jurisdiction.

It is also appropriate to examine the two major jurisdictional statutes under which the district court jurisdiction was originally invoked. These are: 28 U.S.C. § 1362 and 28 U.S.C. § 1331.

28 U.S.C. § 1362 specifically gives an Indian tribe the right to sue in federal court.¹⁰ This Court explained that it was Congress' intent to allow Indian tribes to invoke federal court jurisdiction when the United States chose not to bring suit on their behalf.

Congress contemplated that § 1362 would be used particularly in situations in which the United States suffered from a conflict of interest or was otherwise unable or unwilling to bring a suit as trustee for the Indians, and its passage reflected a congressional policy against relegating Indians to state court when an identical suit brought on their behalf by the United States could have been heard in federal court.

Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 559 (1983) (citations omitted).

Blatchford v. Native Village of Noatak held that § 1362 was not a congressional waiver of a state's Eleventh Amendment immunity from suit in federal court. *Blatchford* did not address the *Ex Parte Young* type injunctive relief. *Blatchford v. Native Village of Noatak*, 501 U.S. at 788.

The instant case presents an aspect of that question left unaddressed in *Blatchford* – the question of whether an Indian tribe can sue state officers in federal court regarding property under a *Tindal/Ex Parte Young* theory.

¹⁰ "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (1966).

The other jurisdictional statute is 28 U.S.C. § 1331, which grants jurisdiction over federal question. Jurisdiction under § 1331 is appropriate because there are federal questions involved. This is a unique situation – separate sovereigns (tribal and state) claiming the same property. If this Court chooses to limit its holding, 28 U.S.C. § 1362 provides an appropriate jurisdiction basis limited to the Indian context.

Another aspect of jurisdiction involves the process used by the district court in the jurisdiction inquiry in a case under the *Ex Parte Young* doctrine. If federal law has been violated, the federal court has jurisdiction to enjoin the violation. If federal law has not been violated there is no jurisdiction. There is the occasional case where the jurisdictional issue is entwined with the merits. Idaho concedes that this is one of those cases. Pet. Br. at 8-10. It has long been held that since a federal court always has jurisdiction to determine its jurisdiction, the court therefore has jurisdiction to proceed to the merits of the case. In the officer property case of *Land v. Dollar*, 330 U.S. 731, 739 (1946), this Court held: "[W]e intimate no opinion on the merits of the controversy. We only hold that the district court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits."

In this case the district court did not follow that direction. After finding that it would have jurisdiction over the Idaho officers under *Ex Parte Young* if there was a violation of federal law, it went to the factual merits on a Fed.R.Civ.P. 12(b) motion without the benefit of

affidavits or other evidence.¹¹ All the court of appeals did was remand the case for consideration of jurisdiction and the merits under the normal procedural avenues such as summary judgment or trial. This is nothing exceptional. The same basic approach has existed since *Tindal*.

Finally it is appropriate to address the suggestion of abstention raised by the Idaho officers' amici Council of State Governments. Council Amici Br. at 19-26.

Abstention serves no purpose in this case.¹² It would be contrary to congressional intent regarding a specially

¹¹ This Court in 1974 explained the proper review standard for an Eleventh Amendment case in the same procedural stance as the present one. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. . . . 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* at 235. (citations omitted).

¹² This Court has held abstention proper in only two types of Indian cases. The first is in the water rights field where Congress had enacted the McCarren Amendment, 43 U.S.C. § 666 (1952) giving state courts concurrent jurisdiction over the adjudication of federal water rights. Abstention was found proper where there was an ongoing state court adjudication. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The second is in the tribal court field requiring tribal judicial remedies be exhausted as a matter of comity before invoking federal court jurisdiction. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Neither are appropriate here.

enacted jurisdictional statute. Congress, in exercise of its constitutionally based plenary power over Indian affairs, has specifically conferred federal court jurisdiction over suits brought by Indian tribes. 28 U.S.C. § 1362 (1966). See *Morton v. Mancari*, 417 U.S. 535 (1974) (Congress' plenary power in Indian matters is constitutionally based).

Abstention has merit only in rare instances such as the furtherance of a congressional policy and only then when there is a viable alternative remedy. Here, abstention would be directly opposed to the congressional policy expressed in the adoption of 28 U.S.C. § 1362. Furthermore as discussed above there is not a viable alternative forum.

This Court's current holdings do not deprive the federal court of jurisdiction to hear this state officer property suit on Eleventh Amendment grounds. There is no justification for departing from the long held approach of *Tindal* and *Ex Parte Young* nor is there any justification for abstention.

II. THE PRESIDENT MAY SET APART OR CONVEY SUBMERGED LANDS AND INTERESTS IN THEM BY EXECUTIVE ORDER WITHOUT PRIOR CONGRESSIONAL DELEGATION

It has long been held that the President can create Indian reservations by executive order. *United States v. Midwest Oil*, 236 U.S. 459 (1915); *Sioux Tribe v. United States*, 316 U.S. 317 (1942). It is also established law that unless previously conveyed or later condemned, states receive title to submerged lands at statehood under the equal footing doctrine. *Shively v. Bowlby*, 152 U.S. 1 (1894);

Block v. North Dakota, 461 U.S. 273, 291 (1983). It is further clear that the United States can convey submerged lands to Indian Tribes as part of their reservation. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

In the second question presented the Idaho officers ask this Court to hold that there was a never before known limitation on the President's power to create Indian reservations.¹³ The Idaho officers ask this Court to rule that the President could never, as a matter of law, set apart submerged lands for an Indian tribe by executive order unless Congress expressly delegated that authority to him. This standard would preclude any factual inquiry into the intent and understanding of Congress, the President and the Tribe. It finds no support in this Court's prior cases.

This Question raises issues involving the respective powers, responsibilities and limitations of Congress and the President regarding federal property under the Property Clause. U.S. Const. art. IV, § 3, cl. 2. This Court has considered the property clause tension between Congress and the President regarding Indian reservations in three major cases: *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915); *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872); and *Sioux Tribe of Indians v. United States*, 317 U.S. 317 (1942). A fourth case that dealt with Indian reservations is *Arizona v. California*, 373 U.S. 546 (1963). Each of these cases will be discussed in detail below. None support the Idaho

¹³ Since 1919 the President has been statutorily prohibited from creating Indian reservations by Executive Order. 43 U.S.C. § 150.

officers' proposition that *as a matter of law* prior congressional delegation of authority is necessary before the President could set apart or convey submerged lands. Instead they strike a practical balance looking at how Congress responded to the President's actions either through acquiescence, *Midwest Oil*, outright congressional recognition of the reservation, *Holden*, and the intent of both Congress and the President, *Sioux Tribe*. A factual inquiry is required.

A. Congressional Acquiescence Validates Presidential Reservation and Setting Apart of Submerged Lands.

The Idaho officers' proposed submerged land exception to *Midwest Oil* cannot withstand close scrutiny under that same case. In *Midwest Oil*, this Court specifically held that the President, acting as Congress' agent and with Congress' acquiescence, could validly reserve federal lands or interest in those lands. *Id.* at 475. Rather than basing its decision on the narrow grounds of the President's Commander-in-Chief powers, the Court chose the broader ground of congressional acquiescence to the President reserving lands by executive order. *Midwest Oil* cited with approval 99 Indian reservations, 109 military reservations and 44 bird reserves as the basis for the congressional acquiescence doctrine. *Id.* at 470. One of those reservations was the Coeur d'Alene Reservation. 1913 Comm'r Indian Affairs Rep. 70-87 (itemizing the 99 Indian reservations set apart by executive order) *quoted in Midwest Oil*, 236 U.S. at 470 n.1. App. 58.

The Idaho officers seek to justify their proposed exception on stray language in *Midwest Oil* which they cite for the proposition that congressional acquiescence to presidential reservations applies only to uplands, not to submerged lands. Pet. Br. 41-42. The analysis fails because of the 44 bird reserves in *Midwest Oil*. 236 U.S. at 470 n.1. Many of the bird reserves included submerged lands. Bird refuges such as Klamath Lake, Lake Malheur, Island Bay, Salt River, Keechelus Lake, Kachess Lake, Chatum Lake, Bumping Lake, and Bering Sea certainly involve submerged lands. Some were pre-statehood and navigable such as the Bering Sea. App. 53, 56. Some were not such as Lake Malheur. See *United States v. Oregon*, 295 U.S. 1 (1935). Many factors must be considered to determine if the executive order reserved or set apart submerged land. A factual inquiry is needed. *Midwest Oil* does not support the Idaho officers' proposed submerged lands exception that would bar any factual inquiry.

No decision of this Court has ever suggested that a different standard should be applied to submerged lands than to uplands on Indian reservations created by executive order. *Midwest Oil* specifically recognized the validity of bird reserves containing submerged lands. *Midwest Oil* specifically recognized the validity of the 1873 Coeur d'Alene Reservation. The validity of the 1873 Coeur d'Alene Reservation cannot now be challenged for submerged lands purposes, or for any other purpose.

B. Congressional Recognition Validates Presidential Reservation and Setting Apart of Submerged Lands.

In *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872), the Court considered the validity of a treaty between the Cherokee Nation and the United States. The terms of the treaty exceeded the express delegation of authority by Congress to the President. *Id.* at 238-239. Recognizing that a treaty is confirmed only by the Senate, not by Congress, one party challenged that portion of the treaty which exceeded the Congressional delegation on property clause grounds. *Id.* at 242-243. It was argued that only Congress could convey property. *Id.* at 247. The validity of the treaty was defended on the basis of the President's treaty making power. The Court found it unnecessary to reach the President's treaty powers because Congress had specifically recognized the validity of the treaty by enacting appropriation statutes.

It is not necessary to decide the question in this case, as the treaty in question has been fully carried into effect, and its provisions have been repeatedly recognized by Congress as valid.

Id.

Holden struck the balance between Congress and the President regarding the setting apart of Indian lands. To hold rigidly that the property clause required Congress – both houses – to set apart Indian lands would have invalidated nearly 100 years of Indian treaties. Conversely, to hold that the President could treat with Indians under his treaty powers or Commander in Chief powers would have undermined Congress' property

clause power.¹⁴ The balance was struck that allowed later congressional recognition to validate the prior action. The Idaho officers did not discuss or even cite *Holden*.

Here, there are three specific instances in which Congress statutorily recognized the validity of the Coeur d'Alene Reservation *prior* to Idaho becoming a state.

First, Congress expressly recognized the 1873 Coeur d'Alene Reservation by *statute* in 1886 (4 years before statehood) when it enacted Chapter 333, which directed the Commission to negotiate with the Coeur d'Alenes for the removal of other Indians to their reservation and for the cession of territory "outside the limits of the present Coeur d'Alene Reservation. . . ." An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes for the Year Ending June 30, 1887, and for Other Purposes, 24 Stat. 44 (1886). App. 7, 8.

The second and third times Congress expressly recognized the validity of the 1873 Coeur d'Alene Reservation, including its navigable waters, were in 1888 and 1889 (1-2 years before statehood). In January 1888, the Senate, by resolution asked the Department of Interior to inform it of several things including: (1) the present area and boundaries of the Coeur d'Alene Reservation, (2) whether the Coeur d'Alene Reservation included any of

¹⁴ "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. Const. art. IV, § 3, cl. 2.

the navigable waters of Lake Coeur d'Alene and the Coeur d'Alene and St. Joseph Rivers, and (3) "*whether it is advisable to release any of the navigable waters aforesaid for the limits of such reservation.*" S. Exec. Doc. No. 76, 50th Cong., 1st Sess. (1888) (emphasis added). App. 16, 17.

The Department of the Interior responded to the Senate in February 1888 with a lengthy and detailed account of the Coeur d'Alene Reservation. S. Exec. Doc. No. 76, 50th Cong., 1st Sess. 1-7 (1888). App. 16-31. It stated that Lake Coeur d'Alene and the Coeur d'Alene River were navigable (it did not know about St. Joseph), and within the Coeur d'Alene Reservation.

. . . [T]he reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs "in a direct line" from the Coeur d'Alene Mission to the head of Spokane River.

Id.

The Department of the Interior also informed the Senate that it would be advisable for the purchase of some of the reservation's navigable waters.

. . . [C]hanges could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.

Id.

Although this Department of the Interior Report gives much general information about the Coeur d'Alene Reservation,¹⁵ there remain volumes of additional evidence to be presented at trial regarding the United States' intent, the Tribe's understanding, the surrounding circumstances including the exigent circumstances and all of the other necessary factual considerations.

¹⁵ The Interior report also generally informed the Senate that there had been an issue regarding the "sale of liquor upon the Steamer Coeur d'Alene within the navigable waters of the reservation . . .," which was only an issue because of a federal statute at the time prohibiting the sale of liquor on Indian reservations. The specifics of this enforcement action are not in the record because of the premature procedural posture of the case. App. 23.

The Coeur d'Alene allowed non-Indians to freely cross the reservation as a result of the Peace Treaty of 1858 in which the United States elicited from the Coeur d'Alenes an agreement to allow non-Indians undisturbed passage through the Reservation.

The Chiefs and head Men of the Coeur d'Alene Nation, promise that all white persons, shall travel through their country unmolested, and that no Indians, hostile to the United States shall be allowed within the limits of their country.

Treaty of Peace and Friendship between the United States and the Coeur d'Alene Indians, Sept. 17, 1858, art. 4.

This peace treaty in effect was another recognition by the United States of tribal ownership of Lake Coeur d'Alene and the Tribe's subjecting its ownership of the lake to what has come to be known as the United State's navigable servitude. By allowing steamers such as the Coeur d'Alene to cross its lake and rivers, the Coeur d'Alene Tribe was simply keeping its word given in 1858.

In May of 1888 (two years before statehood), Congress again expressly recognized the Coeur d'Alene Reservation by *statute* when it granted the Washington and Idaho Railroad a right of way through the Coeur d'Alene Reservation conditioned upon: (1) prior tribal approval, (2) compensation paid to the Tribe by the railroad for the right of way, (3) the railroad not seeking additional Coeur d'Alene tribal land, and (4) any violation of the act forfeiting the right of way. An Act Granting to the Washington and Idaho Railroad Company the Right of Way through the Coeur d'Alene Indian Reservation, ch. 336, 25 Stat. 160-161 (1888). App. 32-35.

This right of way statute is a Congressional enactment treating the Reservation as fee ownership in the Tribe, subject to trusteeship. Tribal consent and compensation were required. If Congress did not consider the Coeur d'Alene Reservation to be a valid federal conveyance to the Tribe, this railroad right of way statute would have been totally unnecessary.

The next year, 1889 (one year before statehood), Congress again expressly recognized the Coeur d'Alene Reservation by *statute* when it directed the Secretary of the Interior to purchase "portions of its [Coeur d'Alene] reservation . . . as such [Coeur d'Alene] tribe shall consent to sell." An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes, for the Year Ending June 30, 1890, and for Other Purposes, ch. 412, 25 Stat. 1002 (1889). App. 36, 37. Again Congress recognized the Coeur d'Alene Reservation as valid and creating property rights in the Tribe that required purchase.

These three statutes in 1886, 1888 and 1889 make clear that regardless of the President's authority when he "set apart" the Coeur d'Alene reservation by executive order in 1873, Congress later expressly recognized the validity of the reservation prior to Idaho's statehood. See *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872). The latter two statutes were passed with Congress' explicit understanding that the reservation contained submerged lands under navigable waters. The United States had properly "set apart" the submerged lands in the Coeur d'Alene Reservation before Idaho became a state. Idaho did not receive these submerged lands under the equal footing doctrine because of this prior conveyance. See *Shively v. Bowlby*, 152 U.S. 1 (1894).

C. Congressional and Presidential Intent Determines Executive Order Conveyances of Land and Executive Order Reservations Include Land and Water.

The Idaho officers overstate the import of *Sioux Tribe v. United States*, 316 U.S. 317 (1942) in the text of the second Question Presented. *Sioux Tribe* establishes that a factual inquiry into the understanding of Congress and the President is the appropriate test when considering whether an executive order in fact conveyed a compensable interest.

The basis of decision in *United States v. Midwest Oil Co.* was that, so far as the power to withdraw public lands from sale is concerned, such a delegation could be spelled out from long continued Congressional acquiescence in the executive practice. *The answer to whether a similar*

delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians must be found in the available evidence of what consequences were thought by the executive and Congress to flow from the establishment of executive order reservations.

Sioux Tribe of Indians v. United States, 316 U.S. 317 at 326 (1942) (emphasis added).

Nothing in *Sioux Tribe* precludes a Tribe from proving compensable title was conveyed by evidence that Congress and the President understood the consequence which flowed from the establishment of the executive order reservation was the grant of compensable title. Indeed the statutes and legislative history discussed above regarding *Holden* are proof of that very fact. Additional proof is: (1) the 1890 annual report of the Secretary of the Interior stating that the Coeur d'Alene Reservation was permanent and referring to the 1889 Act of Congress directing that the executive branch negotiate the purchase of a portion of the reservation, App. 37, and (2) the 1891 statute approving the negotiated agreement requiring payments. App. 40. The inquiry under *Sioux Tribe* is a factual one to be conducted by the district court.¹⁶

¹⁶ The Idaho officers point to the "withdraw from sale" language of the 1873 Executive Order for the proposition that the intent was to reserve only the uplands because lakes and rivers are not to be sold. Pet. Br. 43, n.7. The Idaho officials fail to explain the "set apart as a reservation for the Coeur d'Alene Tribe" language. This is the operable language that was used in almost every treaty since the Cherokee Nation treaty to convey title to tribes when creating reservations. See, e.g., *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

The final case that addresses executive order reservations is *Arizona v. California*, 373 U.S. 546 (1963). One issue in this long running case addressed a state challenge to tribal water rights. The state argued that water rights (one of the usage rights at issue in this case) cannot be reserved by executive order. Rejecting that contention, this Court stated:

Some of the reservations of Indians here involved were made almost 100 years ago, and all of them were made over 45 years ago. In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well. . . . We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive.

Arizona v. California, 373 U.S. at 598. See also *Antoine v. Washington*, 420 U.S. 194 (1975) (fishing rights reserved by executive order).

Arizona v. California stands for the proposition that executive order reservations include both land and water. This certainly includes all usage rights in the water such as the ones in this case. This would also seem to include land under water, or submerged lands. There is nothing to the contrary. The Idaho officers' submerged land exception is foreclosed by *Arizona v. California*.

D. Factual Inquiries Are Required to Resolve Submerged Land Ownership Disputes.

Factual inquiries are required to resolve this case. As discussed above, there needs to be a determination of

whether the executive order operated as a grant or conveyance under *Holden* and to decide if Congress recognized the validity of the reservation. Under *Sioux Tribe* there needs to be a factual inquiry to ascertain the consequences that Congress and the President felt flowed from the establishment of the executive order reservation.

Under the other Tribal theories of ownership there also needs to be factual determination. Those theories include aboriginal title,¹⁷ the effective date of the congressionally approved agreements between the Coeur d'Alene Tribe and the United States,¹⁸ and tribal ownership through state law

¹⁷ The Tribe alternatively claims ownership of the submerged lands on the theory of aboriginal title. *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (recognizing Indian title of use and occupancy until extinguished). *Mitchel v. United States*, 34 U.S. 711 (1835) (Indian title considered as sacred as fee title). *United States v. Santa Fe Railroad*, 314 U.S. 339 (1941) (extinguishment of Indian title not lightly inferred). *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 (1985) ("a sovereign act [is] required to extinguish aboriginal title."). The court of appeals remanded the aboriginal title issue. Pet. App. at 28. Certiorari was not requested or granted on the aboriginal title issue.

¹⁸ The effective date of the Coeur d'Alene Reservation is 1887 (three years prior to statehood), the date of the Agreement ceding aboriginal lands and agreeing to various terms. The submerged lands were conveyed to the Tribe at that time. See *Northern Pacific R.R. v. Wismer*, 246 U.S. 283 (1918) (executive order reservation effective on date of agreement, not later date of issuance of Order); *Buttz v. Northern Pac. R. Co.*, 119 U.S. 55 (1886) (agreement with tribe effective when entered, Congress' ratification serves as acceptance of cession). See also *In re Washington Water Power Company*, 1983 WL 37712 (F.E.R.C.) (vacated on jurisdictional grounds) (Coeur d'Alene Reservation effective on pre-statehood date of agreements - 1887-1889 not post-statehood date of congressional approval thereby

regarding ownership of submerged lands at the time of establishment of the Reservation.¹⁹

To the extent the officers characterize the Question Presented as the court of appeals dispositive holding, it is a mischaracterization. All of these issues require a factual inquiry which did not occur at the district court or the court of appeals. The court of appeals simply remanded to the district court for this factual inquiry to take place.

There is also the separate factual inquiry under the tribal ownership of submerged land cases. Since *Shively v. Bowlby*, 152 U.S. 1 (1894), this Court has uniformly held that the determination of ownership in submerged land disputes requires a factual inquiry. This case is no different.

The general rule is that pre-statehood, the submerged lands under navigable waters are held by the United States for the future states' ownership "on equal footing"

defeating Idaho equal footing claim to a portion of Lake Coeur d'Alene).

¹⁹ At the time of creation of the Coeur d'Alene Reservation the Idaho law was that the riparian or littoral owner owned to the middle of the stream or lake. *United States v. Ladley*, 4 F.Supp. 580 (D.Id. 1933) (at the time of Idaho statehood and for the next 25 years Idaho did not claim ownership of submerged lands under either navigable or non-navigable watercourses). The creation of the reservation is a matter of federal law, but state law is looked to to determine certain ownership issues of submerged land. Since the Tribe was the riparian and littoral owner, the submerged land became part of the reservation at that time (if title had passed to Idaho under the equal footing doctrine).

with the original 13 states. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

But the original 13 states did not consider submerged lands of particularly great importance. With the exception of a few large rivers, only three of the original 13 states claimed ownership of all submerged lands under fresh-water inland navigable streams. *Shively v. Bowlby*, 152 U.S. 1, 31 (1894). In the other ten, the riparian property holders owned some or all of the submerged lands. *Id.* Other submerged lands were also dealt with in a variety of manners. *Id.* at 18-26.

Shively struck the balance between various competing interests. The balance adopted was that pre-statehood, the federal government could, for an appropriate public purpose, make a conveyance of submerged lands to others. *Id.* at 57-58. Otherwise the federal government would generally hold the title to submerged lands of navigable watercourses below the high water mark for the future states at statehood.

There are four leading cases which have addressed disputes involving tribal ownership of submerged lands. In two of the cases the Indian tribes prevailed. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) (the reservation established for the Metlakahtlan Indians included the submerged lands surrounding the Annette Islands); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) (the treaty setting apart the Choctaw Reservation included the Arkansas River in the reservation). The Idaho officers did not address or even cite these cases.

States' interests have prevailed in the two other cases. *United States v. Holt State Bank*, 270 U.S. 49 (1926)

(creation of the Red Lake reservation did not convey ownership of the submerged lands to the Red Lake Chippewas). *Montana v. United States*, 450 U.S. 544 (1981) (creation of the Crow Reservation did not convey ownership of the Big Horn River to the Crows).²⁰ The Idaho officers cited to *Montana* "passim".

Under the principles set forth in these four cases the resolution of disputes between Indian tribes and states is almost totally fact based. The central factual inquiries are: (1) the wording of the document creating or recognizing this reservation, (2) the intent and understanding of the United States and (3) the intent and understanding of the Tribe. *Montana* established a "strong presumption" of state ownership, but like any presumption, it can be overcome with facts.

There are also the well settled rules of construction that are to be applied in Indian cases. Documents creating Indian reservations are to be construed "in the sense in which they would naturally be understood by the Indians." *Washington v. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) quoting *Jones v. Meehan*,

²⁰ The *Montana* Court rejected the reasoning of a prior court of appeals' decision of the same factual issue in the unrelated criminal case regarding public exigencies and the tribe's dependency on fishing, and came to the opposite result. *United States v. Finch*, 548 F.2d 822, 829 (9th Cir. 1976) (Kennedy, Circuit Judge). Unlike the Crow Tribe, however, the Coeur d'Alenes are traditionally a fishing people and have been dependent on Lake Coeur d'Alene for that purpose from time immemorial. At trial, the Tribe will offer evidence to this effect, as well as the lake's importance to them culturally, for commerce, and other purposes.

175 U.S. 1, 11 (1899). Second, "statutes are to be construed liberally in favor of Indians with ambiguous provisions interpreted to their benefit." *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) citing *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (citations omitted); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Antoine v. Washington*, 420 U.S. 194 (1975); See also, *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

E. Federal Government Submerged Land Reservation Test is Inappropriate for an Indian Tribe.

In their brief the Idaho officers raise the issue of whether the court of appeals erred holding the *Montana* test,²¹ rather than the *Utah* test,²² should be used when the facts of this case are considered. This issue seems to be well beyond either Question Presented, but having been raised it must be addressed.

The basis of the Idaho officers' argument is that this is a "reservation" not a "conveyance", and therefore this

²¹ The *Montana* submerged lands test is that a state is entitled to a strong presumption of ownership. The presumption can be overcome by evidence that the United States intended to set apart the submerged land for the Tribe. *Montana v. United States*, 450 U.S. 544, 552-554 (1981).

²² *Utah Division of Lands v. United States*, 482 U.S. 193, 202 (1987). The *Utah* submerged lands test is that a state is entitled to a strong presumption of ownership. The presumption can be overcome by facts that the United States intended to include submerged lands in the reservation and to defeat future state title.

must be analyzed under the *Utah* test because *Utah* dealt with a "reservation." Pet. Br. 44. There is no basis for applying the *Utah* test in this Indian case. The *Utah* test was developed for use when the United States reserves for itself. As *Utah* pointed out, there will always be confusion as to whether the United States is reserving for some particular management objective or intends to defeat future state title. *Utah*, 482 U.S. at 202. The intent should be clarified.

When the United States formally "sets apart" an Indian reservation, like was done in this case, it is in the nature of a conveyance that the intent is to vest some degree of title in the tribe. Consequently, the *Montana* test is appropriate.

The court of appeals also correctly noted that this Court must have intended the *Utah* test not to apply to Indian reservations because of the wording in *Utah*. Pet. App. 25-26. In *Utah*, this Court stated it had never addressed whether the "reservation" of submerged lands could defeat future state title under the equal footing doctrine. Because that issue had been considered in a "set apart" Indian reservation several times before, the court of appeals properly concluded that the *Utah* test was not intended by this Court to be applicable to the Indian reservation situation. Pet. App. 25-26. The *Montana* test is to be applied in this case.

CONCLUSION

At the direction of the United States Congress the Northwest Indian Commission in 1887 traveled to Coeur d'Alene territory for the specific purpose of obtaining a cession agreement for lands outside its 1873 Reservation. When concluded, the agreement contained the solemn promise that the Reservation:

shall be held forever as Indian land and as homes for the Coeur d'Alene Indians . . . and their posterity; and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

App. 42. In explaining this provision to Congress the Indian Commission wrote:

It may be said that this [clause] was unnecessary, inasmuch as no such thing would happen; but the loss of their former possessions and other causes had so excited their fears that it was concluded, in order to allay suspicion, and *in as strong a manner as possible, bind the Government to that good faith which the Indian prizes so highly and which he thinks has been violated so frequently.*

1983 WL 37712 (F.E.R.C.) (quoting House Executive Document No. 63, 50th Congress, 1st Sess.) (emphasis added). Certainly, both sides to that agreement valued those terms to have the same meaning and effect as the Choctaw Nation and the United States understood the treaty to have as interpreted in *Choctaw Nation v. Oklahoma*. Yet more than 100 years after those promises were made, the Coeur d'Alene Tribe confronts obstacles to proving their

claim which their ancestors could not have conceivably contemplated.

The State's officers seek the cover of the State's Eleventh Amendment immunity to bar Tribal access to the only forum suited to resolve federal property interest questions. In case that proves insufficient, the officers further seek protection of a theory which denies the historical reality of Executive and Legislative practices establishing Indian reservations. While these obstacles were unforeseeable in 1887, they make clear the reasons underlying the need felt by Tribal leaders for a demonstration of good faith.

Contrary to the officers' positions, the doctrines and cases developed by this Court around the issues presented in this matter do not bar access to the federal court. Nor do they so easily and silently take from the Tribe that which was promised. Instead, they clear the path for the Tribe to have its claims justly adjudicated.

For the foregoing reasons, the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX 1

The
Pacific Northwest Quarterly
Vol. 34 April 1943 Number 2
at pp. 178-180 (VIII)

Father Joset

Head Quarters Expedt against Northn
Indians Camp, near the Coeur d'Alene
Mission W.T.

September 17th 1858

Rev. Sir,

Inclosed herewith, is a copy of the Treaty this day made between the United States and the Coeur d'Alene Nation: I will thank you to place it in the hands of the head chief of the tribe.

I beg of you to express to the chiefs of the Coeur d'Alenes, the great pleasure I have felt, in seeing them come with all their people, promptly and willingly, and acknowledging their error, & putting their trust in us in all things.

Now my dear sir, I must thank you very sincerely for your zealous and persevering efforts in bringing about this accomadation, (sic) which has terminated so successfully.

With great regard
I remain very Respy
G. Wright
Col. 9th Infy
Commander U.S. Troops

Rev. Father Joset
Sac. Heart Missn

App. 2

Preliminary articles of a Treaty of peace
and friendship between the United States
& the Coeur d'Alene Nation of Indians
Sept. 17th 1858.

(Official Copy)
G. Wright
Col. 9th Infy
Commander U.S. Troops

Preliminary Articles of a Treaty of Peace and Friendship
between the United States and the Coeur d'Alene
Indians.

- Art. 1' Hostilities between the United States and the
Coeur d'Alene Indians shall cease from and
after this date, 17' September 1858.
- Art. 2' The Chiefs and head Men of the Coeur d'Alene
Indians for, and in behalf of the whole nation,
agree and promise, to surrender to the United
States all property in their possession, belonging
either to the government, or to individuals,
whether said property was captured, or aban-
doned by the Troops of the United States.
- Art. 3' The Chiefs and head Men of the Coeur d'Alene
Nation, agree to surrender to the United States,
the men who commenced the Battle with Lt. Col.
Steptoe, contrary to the orders of their chiefs,
and also to give at least One chief and four men
with their families, to the Officer in Command
of the Troops, as hostages for their future good
conduct.
- Art. 4' The Chiefs and head Men of the Coeur d'Alene
Nation, promise that all white persons, shall
travel through their country unmolested, and

App. 3

that no Indians, hostile to the United States shall
be allowed within the limits of their country.

- Art. 5' The Officer in command of the United States
Troops for and in behalf of the government,
promise, that if the foregoing conditions are
fully complied with, No War shall be made upon
the Coeur d'Alene Nation; and further that the
men who are to be surrendered, whether those
who commenced the fight with Lt. Col. Steptoe,
or as hostages for the future good conduct of the
Coeur d'Alene Nation, shall in no wise be
injured, and shall within one year from the date
hereof, be restored to their Nation.
- Art. 6' It is agreed by both of the aforesaid contracting
parties, that, when the foregoing Articles shall
have been fully complied with, a permanent
Treaty of Peace and Friendship shall be made.
- Art. 7' It is agreed by the chiefs and head Men of the
Coeur d'Alene Nation, that this treaty of peace
and friendship shall extend also to include the
Nez Perce Nation of Indians.

Done at the Headquarters of the
Expedition against Northern
Indians

At the Coeur d'Alene Mission,
Washington Territory
This seventeenth day of
September Eighteen hundred and
fifty eight.

G. Wright
Col. 9th Infy
Command, U.S. Troops

APPENDIX 2

Annual Report (1873) of the Commissioner of Indian Affairs (excerpted from 43rd Cong., 1st Sess. House Exec. Doc. No. 1, Vol. 4)

REPORT
of the
COMMISSIONER OF INDIAN AFFAIRS.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
November 1, 1873.

I have the honor, in accordance with law, to forward herewith the annual report of Indian affairs of the country.

* * *

[p. 385]

COEUR D'ALENES.

The commission appointed to visit certain Bannock Tribes, near Fort Hall, Idaho, were directed, under instructions from this office of the 1st of July last, to visit the Coeur d'Alene Indians to hear complaints, with a view to their cure or removal, and to induce them to abandon a roving life and to consent to confine themselves to a reservation. They succeeded in having a council with these Indians, and as a result of their negotiations, the Indians agreed to go upon a reservation which was, at the time, described to them, and which has since been set apart temporarily by the President until legislation can be had thereon by Congress. For further

particulars attention is invited to article entitled "Legislation recommended."

* * *

[p. 391]

LEGISLATION RECOMMENDED.

* * *

[p. 392]

AGREEMENT WITH COEUR D'ALENE
INDIANS IN IDAHO.

In 1867 an Executive Order was issued setting apart a reservation for the Coeur d'Alenes, but, being dissatisfied with the location, they never located thereon, and continued to roam over the tract of country claimed by them. For the purpose of extinguishing their claim to all the tract of country claimed by them, and of locating them on a reservation suitable to their wants as an agricultural people, an agreement has been made with them by Hon. J.P.C. Shanks, Gov. Bennett, of Idaho, and Agent J.B. Montieth, subject to ratification by Congress, which is respectfully recommended. Pending such action by that body, I have deemed it prudent to have set apart by executive order the tract of country described in said agreement as a reservation for said Indians, in order that white persons may be prohibited from settling thereon and claiming compensation for improvements from the Government.

APPENDIX 3

Index to the Executive Documents of the House of Representatives for the Third Session of the Forty-fifth Congress, 1878-'79

* * *

[p.266-267]

Executive Mansion, *November 8, 1873.*

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory, viz:

"Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) creeks, directly south of a point on said last-named creek, six miles above the point where the trail from Lewiston to Spokane bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of the said ridge to the place of beginning."

U.S. GRANT

APPENDIX 4

Statutes at Large From Dec. 1885 To March 1887, Vol. XXIV FORTY-NINTH CONGRESS. SESS. I. CH. 333

[1886]

* * *

[p.29]

CHAP. 333. – An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-seven and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department for the year ending June thirtieth, eighteen hundred and eighty-seven, and fulfilling treaty stipulations with the various Indian tribes, namely:

* * *

At the Colville agency, at one thousand five hundred dollars;

* * *

[p.42]

GENERAL INCIDENTAL EXPENSES
OF THE INDIAN SERVICE.

* * *

[p.43]

Incidental expenses of Indian service in Washington Territory: For general incidental expenses of the Indian service, including traveling expenses of agents at seven agencies, and the support and civilization of Indians at Colville and Nisqually agencies, and pay of employees, including a physician for Coeur d'Alene reservation, sixteen thousand dollars.

* * *

MISCELLANEOUS.

* * *

[p.44]

. . . [T]o enable said Secretary to negotiate with the Upper and Middle bands of Spokane Indians and Pend d'Oreilles Indians, in Washington and Idaho Territories, for their removal to the Colville, Jocko, or Coeur d'Alene reservations, with the consent of the Indians on said reservations; and also to enable said Secretary to negotiate with said Indians for the cession of their lands to the United States; and also to enable said Secretary to negotiate with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene reservation to the United States, fifteen thousand dollars, or so much thereof as may be necessary, to be immediately available; but no agreement made shall take effect until ratified by Congress.

* * *

APPENDIX 5

House of Representatives 50th Congress, 1st Session,
Ex. Doc. No. 63 Excerpts from pp. 2, 3, 9

REDUCTION OF INDIAN RESERVATIONS

MESSAGE
FROM THE
PRESIDENT OF THE UNITED STATES,
TRANSMITTING

A communication from the Secretary of the Interior, with accompanying papers, relating to the reduction of Indian reservations.

January 9, 1888. – Referred to the Committee on Indian Affairs and ordered to be printed.

To the Senate and House of Representatives:

I transmit herewith a communication of 30th December, 1887, from the Secretary of the Interior, submitting, with accompanying papers, two additional reports from the Commission appointed to conduct negotiations with certain tribes and bands of Indians for reduction of

reservations, etc. under the provisions of the act of May 15, 1886 (24 Stats., 44), providing therefor.

GROVER CLEVELAND.

EXECUTIVE MANSION

January 9, 1888.

DEPARTMENT OF THE INTERIOR

Washington, December 30, 1887

The PRESIDENT:

Under the respective dates of January 11 and February 17, 1887, I had the honor to submit to you for transmittal to Congress two separate reports received by this Department through the Commissioner of Indian Affairs from the Commission commonly known as the Northwest Indian Commission, appointed under the provisions of the act of May 15, 1886, to negotiate with certain Indian tribes in Minnesota and the Northwest Territories (24 Stats., 44).

* * *

[p. 2]

I now have the honor to submit herewith two additional reports made by the said commission, with the accompanying letter of the Commissioner of Indian Affairs forwarding them to the Department, with five agreements made with various tribes and bands of Indians in the Northwest, viz: The Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians upon the reservation commonly known as the Great Blackfeet Reservation in northern Montana; the Upper and Middle bands

of Spokane Indians; the Coeur d'Alene Indians; the Pend d'Oreille or Calispel Indians; the Indians upon the Jocko Reservation in Montana.

* * *

The five agreements now presented, together with the three heretofore reported, complete the work of negotiation so far as it could be accomplished by the Department with the tribes and bands of Indians for which provision was made in the act of May 15, 1886.

The Commissioner of Indian Affairs in his report, herewith, reviews at some length the provisions of each of the accompanying agreements, which may be briefly though very generally summarized, as follows:

* * *

The Coeur d'Alene Indians, in the agreement made with them, relinquish to the United States, for the consideration of \$150,000, to be expended for their benefit, etc., all right, title, and interest they now have or ever possessed to and in any lands outside the limits of their present reservation in the Territory of Idaho; they also agree to the removal to and settlement upon their reservation of the Upper and Middle bands of Spokane Indians, the Calispels (Pend d'Oreilles) now residing in the Calispel Valley, and to any other bands of non-reservation Indians belonging to the Colville Agency, Washington Territory, etc.

* * *

[p. 3]

The law under which these negotiations have been conducted provides that "no agreement shall take effect until ratified by Congress."

The Commissioner of Indian Affairs in his report herewith expresses the opinion that these agreements are just and favorable alike to the Government and to the Indians. He recommends their speedy ratification, and submits estimates of the various amounts required to be appropriated at this time by Congress to carry out the terms of the negotiations, which will be found on the concluding pages of his report.

By these negotiations a very large area of land now in state of reservation for Indian purposes, being the excess of quantity needed for the actual use of the tribes and bands for whom it has been held in reservation, is placed at the disposal of the United States so that it may be opened to settlement in such manner as Congress in its wisdom may direct; and further, the adjustment of claims asserted by Indians to large portions of land in Washington and Idaho Territories, now largely occupied by settlers, is provided for. When these negotiations shall have been fully ratified they will remove some serious hindrances to the contentment, the permanent settlement, and the more rapid advancement in civilization of the tribes and bands who are parties thereto. The money necessary to be appropriated for their support and to assist them forward in the ways of civilization will not be, as heretofore, so largely a gratuity from the Government, but will go to them by judicious expenditures as

consideration for valuable rights and claims which they have ceded and relinquished to the Government.

For these and other like reasons I concur in the recommendation of the Commissioner that the agreements be speedily ratified.

I have the honor to be, very respectfully, your obedient servant.

L.Q.C. LAMAR,
Secretary.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 13, 1887.

SIR: . . . I now have the honor to transmit herewith duplicate copies of two additional reports of said Commission and accompanying agreements (five in all) made with the several tribes in northern Montana, occupying the Gros Ventre, Piegan, Blood, Blackfeet and Crow River Reservation, commonly known as the Great Blackfeet Reservation, and the Upper and Middle bands of Spokane Indians, the Pend d'Oreilles, or Calispels, and the Coeur d'Alenes in Idaho, and the Flathead, Pend d'Oreille and Kootenai Indians of the Flathead Reservation in Montana. These reports are dated, respectively, February 11 and June 29, 1887.

The Commissioners report that many of the Indians are anxious to remove at once to their new homes, and they strongly urge the speedy ratification of the agreement.

[p. 9]

AGREEMENT WITH THE COEUR D'ALENE INDIANS.

These Indians also lay claim to a large tract of country in Washington, Idaho, and Montana Territories, by right of original occupancy, and, as we have seen, the act authorized negotiations with them "for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States."

By the terms of the agreement made with them, the Indians cede and relinquish to the United States all right, title, and interest they now have or ever possessed in any lands outside the limits of their present reservation.

They also agree to the removal and settlement upon their reservation of the Upper and Middle bands of Spokane Indians, upon the terms and conditions agreed upon with said Spokane Indians, and also to the removal and settlement there of the Calispels (Pend d'Oreilles) now residing in the Calispel Valley, and any other band of non-reservation Indians belonging to the Colville Agency, upon terms agreed upon with any such bands.

In consideration of the foregoing, it was agreed that the Coeur d'Alene Reservation shall be forever held as Indian lands, for the home of the Coeur d'Alene and other bands settled there under said agreements, and that it shall never be sold or otherwise disposed of without their consent.

It is further agreed that the United States shall expend the sum of \$150,000 for the benefit of the Coeur d'Alene Indians; \$30,000 the first year and \$8,000 per annum for fifteen years thereafter, in providing them

with a steam saw and grist mill, in the employment of an engineer and miller, and in the purchase of such useful articles as shall best promote their civilization, education, and comfort, and, under certain stipulated conditions, cash payments may be made to them. In addition to this, it is agreed that the United States shall employ, at its own expense, a competent physician, blacksmith, and carpenter, and supply medicines for said Coeur d'Alene Indians.

There are some other provisions intended to protect the morals and improve the condition of said Indians, but the foregoing are the principal features of the agreement.

The Commissioners give an interesting account of the Coeur d'Alene Indians, and commend them in the highest terms for industry, thrift, and sobriety. They speak of them as polite in a marked degree and exceedingly good-natured. They wear short hair, dress like the whites, and emulate them in everything save their vices. They live in comfortable houses, many of them having two - one on the farm and another in the village - cultivate the soil extensively, are loyal to the Government, respectful of the laws, devoted to their religion, and in short a better ordered or behaved community of Indians can nowhere be found. Such is the testimony of the Commissioners.

APPENDIX 6

Senate
50th Congress, 1st Session, Ex. Doc. No. 76
pp. 1-7

LETTER
FROM
THE SECRETARY OF THE INTERIOR,
Transmitting,

*In response to Senate resolution of January 25, 1888,
information about the Coeur d'Alene Indian Reservation, in
Idaho.*

February 13, 1888 – Ordered to be printed, and referred to
the Committee on Indian Affairs.

DEPARTMENT OF THE INTERIOR
Washington, February 9, 1888.

SIR: I have the honor to acknowledge the receipt by the
Department on the 26th day of January last, of a resolu-
tion of the Senate, adopted upon the 25th of January,
1888, which, omitting the preamble thereto, is in the
following words:

Resolved, That the Secretary of the Interior be, and he is
hereby, directed to inform the Senate as to the extent of
the present area and boundaries of the Coeur d'Alene
Indian Reservation in the Territory of Idaho: whether
such area includes any portion, and if so about how
much, of the navigable waters of Lake Coeur d'Alene and
of Coeur d'Alene and St. Joseph Rivers; about what pro-
portion of said reservation is agricultural, grazing, and
mineral lands, respectively; also the number of Indians
occupying such reservation; also on what portion of said
reservation the Indians now thereon are located; also

whether, in the opinion of the Secretary, it is advisable to
throw any portion of such reservation open to occupation
and settlement under the mineral laws of the United
States, and, if so, precisely what portion; and also
whether it is advisable to release any of the navigable
waters aforesaid from the limits of such reservation.

In response thereto I transmit herewith a communica-
tion, under date of the 7th instant, from the Commis-
sioner of Indian Affairs, to whom the resolution was
referred to report the facts required to properly meet the
inquiries therein contained. This report states that the
Coeur d'Alene Reservation, in the Territory of Idaho,
embraces an area of 598,500 acres – 935 square miles; that
it is situated in the northern portion of the Territory,
between the 47th and 48th parallels of north latitude, and
presents as an exhibit a map showing the outline bound-
aries of the reservation. It describes the portions of the
navigable waters of Lake Coeur d'Alene and of the Coeur
d'Alene River which traverses the reservation, and states
the absence of information necessary to show how much
of the St. Joseph River, which flows through the reserva-
tion, is navigable, or whether it is navigable at all.

The Commissioner also reports that as but a small
portion of the reservation has been surveyed (less than
three townships), he is unable to furnish more than a
rough estimate of the character of the lands embraced
therein, which is that at least one third of its entire area is
agricultural, one-third mountain and timber, and the
remainder hilly and probably suitable for pasturage; that
east of the lake and north of the Coeur d'Alene River the
lands are described as "all mountains," and along the
north line of the reservation, also east of the lake, are

lands described as mineral lands. He also reports the number of Indians upon the reservation, as per last census, to be 487, nearly all of whom he believes live on that portion of the reservation lying south of the Lake Coeur d'Alene and St. Joseph River, and not far away from the Old Mission on Hangman's Creek.

The Commissioner further states that, in his opinion, the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any lands so taken.

In connection with this matter the Commissioner refers to the negotiations lately authorized by Congress and concluded with these Indians for the cession of their lands outside the limits of the present Coeur d'Alene Reservation, as shown by agreement published in House Ex. Doc. No. 63, Fiftieth Congress, first session, pp. 53-56, under the provisions of which arrangement has been made for the removal to and settlement upon said reservation of sundry non-reservation Indians; and he reports as his opinion that when the present agreement shall have been ratified it will be an easy matter to negotiate with the Coeur d'Alenes for the cession of such portions of their reservation as they do not need, including all or a

portion of the navigable waters, upon fair and very reasonable terms.

I have the honor to be, very respectfully,

H.L. Muldrow,

Acting Secretary.

The PRESIDENT PRO TEMPORE OF THE SENATE.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,

Washington, February 7, 1888.

SIR: I have the honor to acknowledge the receipt, by your reference the 26th ultimo for report, of a resolution of the Senate of the United States of January 25, 1888, as follows:

Whereas it is alleged that the present area of the Coeur d'Alene Indian Reservation, in the Territory of Idaho, embraces 480,000 acres of land; that there are, according to the statistics in the Indian Bureau, only about 476 Indians in the tribe now occupying such reservation, or more than 1,000 acres to each man, woman and child; that Lake Coeur d'Alene, all the navigable waters of Coeur d'Alene River, and about 20 miles of the navigable part of St. Joseph River, and part of St. Mary's, a navigable tributary of the St. Joseph, are embraced within this reservation, except a shore-line of about 3 1/2 miles at the north end of the lake, it being alleged that this lake and its rivers tributary constitute the most important highways of commerce in the Territory of Idaho, and are in fact the only navigable waters except Snake River, now used for steam-boat navigation, in the Territory; that all boats now entering such waters are subject to the laws governing the Indian country, and all persons going on

such lake or waters within the reservation lines are trespassers; and

Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same, around DeSmedt (sic) Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture; and it being further alleged that all that part of such reservation lying between Lake Coeur d'Alene and Coeur d'Alene River and that part between the Coeur d'Alene River and St. Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians:

Therefore,

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and, if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing, and mineral land, respectively; also the number of Indians occupying said reservation; also on what portion of such reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limit of such reservation.

Agreeably with the directions contained in said resolution I have the honor to state:

(1) The Coeur d'Alene Reservation, in the Territory of Idaho, embraces an area of 598,500 acres, or 935 square miles.

It lies in the northern portion of said Territory, between the forty-seventh and forty-eighth parallels of north latitude, and has for its western boundary the dividing line between Idaho and Washington Territories.

It is somewhat in the shape of a scalene triangle with one of its points cut off, its longest side (east boundary line) being about 42 miles, and its shortest (north boundary line) about 35 miles long. The west line is about 39 miles long.

From the official map of Idaho (1883) and sundry others examined, the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs "in a direct line" from the Coeur d'Alene Mission to the head of Spokane River.

This lake is about 35 miles long and from 2 to 5 miles wide.

The Coeur d'Alene River traverses the reservation for a distance of about 25 miles, entering the reservation from the east and emptying into Lake Coeur d'Alene.

The St. Joseph River also flows through the reservation, entering from the east and finding its outlet in said lake.

The Coeur d'Alene River is navigable in its entire course through the reservation, and steamers ply from the head of the lake to the mouth of the river, and thence up the river to the Old Mission on the east line of the reservation, a river passage of about 25 miles. How much farther the river is navigable toward its source and beyond the limits of the reservation I have no means of knowing.

I am unable to furnish any information as to how much of the St. Joseph's River is navigable, or whether indeed it is navigable at all. From the maps it would appear to be quite as large as the Coeur d'Alene River.

As to what proportion of the reservation is agricultural, grazing, and mineral land, respectively, I have to state that as but a very small portion (less than three townships) of the reservation has been surveyed. I am unable to furnish any thing more than a rough estimate of the areas of the several classes referred to. From a rude sketch of the reservation prepared by the farmer in charge, with a view to showing as nearly as possible the character of the lands embraced within the reservation, I should judge that a least one-third of the entire area of the reservation is agricultural, one-third mountain and timber, and the remainder hilly and probably suitable for pasturage.

I inclose a copy of the map or sketch, and invite especial attention to it as giving the most satisfactory information obtainable from the records of this office. It is drawn upon a scale of 2 miles to the inch.

It will be observed that the lands in the extreme northern portion of the reserve, west of the lake, for a

distance of 10 or 12 miles south, are described as "timbered lands on mountains, with small valleys of pasture lands." From thence south to the hills south of the Farmington Landing road they are set down either as first or second class "agricultural lands," and so of all the lands lying directly south of the lake until the "hill-land" is reached. Then south of the hilly lands, extending along the entire course of Hangman's Creek, is a wide strip described as "agricultural lands, first class."

East of the lake and north of the Coeur d'Alene River the lands are described as "all mountains," and along the north line of the reservation, also east of the lake, are lands described as "mineral lands."

A strip one-half mile wide on both sides of the Coeur d'Alene River along its entire length is described as "fertile valley, overflowed every spring."

South of the Farmington road and along the entire east line of the reservation is a broad strip varying from 2 to 8 miles wide, described as "all hill-land; is timbered, and soil third rate, in places rocky."

The west side of Coeur d'Alene Lake appears to be skirted all along with timbered mountains or hills.

A map accompanying the report of an inspection made in 1886 by Lieut. Col. H.M. Lazelle, Twenty-third Infantry, acting inspector-general, Department of the Columbia, with reference to the sale of liquor upon the steamer *Coeur d'Alene* within the navigable waters of the reservation, will be found valuable, as showing the location of the neighboring towns and mines with reference to the reservation, the steamboat route through Lake

Coeur d'Alene, and the Coeur d'Alene River, the wagon roads and trails entering and crossing the reservation, mountain ranges, railroads, etc., and I have thought best to have a copy of said map made to accompany this report.

It might be proper to state here that Inspector Gardner, who visited the Coeur d'Alene Reservation in September of last year, places a much smaller estimate upon the quantity of agricultural land within the reservation than the farmer's map would indicate, but he could hardly be expected to have as perfect a knowledge of the reservation as the resident farmer in charge.

Inspector Gardner says:

The land embraced in the Coeur d'Alene Reserve, 598,500 acres, is in Idaho Territory. It is rough and very mountainous, and not more than 50,000 or 60,000 acres susceptible of profitable cultivation. A large portion of the Reservation is heavily timbered.

The number of Indians occupying the reservation as per last census, taken June 30, 1887, is 487. I believe all, or nearly all, live on that portion of the reservation lying south of the Lake Coeur d'Alene and St. Joseph River, and not far from the Old Mission on Hangman's Creek.

The question which remains to be answered is, whether it is advisable to throw any portion of the said reservation open to occupation and settlement under the mineral laws of the United States and, if so, precisely what portion, and whether it is desirable to release any of the navigable waters mentioned in the resolution from the limits of said reservation.

In approaching this question, I deem it proper to refer briefly to the character and condition of the Indians occupying the reservation and the situation of affairs as existing amongst them.

There are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced, and even they need not be excepted in any comparison either of their virtues, habits of industry, loyalty, or ambition to attain a higher stage of civilization.

They cultivate the soil extensively, live in comfortable houses, dress like the whites do, wear short hair, and in all other respects live and do as white people do. Their houses are painted inside and outside, their barns are well built and commodious, and they have all the improved farm implements and machinery. They own large bands of cattle and horses and an abundance of hogs and poultry.

The Northwest Indian Commission, in the report of its recent visit to these Indians, said:

Each one has a comfortable house on his farm, and nearly all have equally comfortable houses at the mission, which together make quite a village. They remain on their farms during the week days, and on the Sabbath repair to their dwellings at the village to attend religious services and see their children who are at the Mission schools. Long experience in self-reliance and traffic with the neighboring whites has made them cautious, shrewd, and provident in the use of money. We learned that their trade in one town adjacent to the reservation amounts to about \$25,000 yearly. A better and better behaved Indian community can nowhere be found.

Furthermore, the Coeur d'Alene Indians have been for many years the firm friends of the whites. A notable instance of this was the part they took in the memorable Nez Perce outbreak of 1878. They not only shielded and protected the whites in that disastrous war to the fullest extent of their power, but guarded their property at the peril of their own lives, when a large portion of the white population had fled the country for safety.

When peace was restored the people acknowledged their good services and thanked them in formal terms, promising also to assist them in obtaining permanent title to their homes.

I have said this much in order to show that the Coeur d'Alene Indians are quite intelligent and fully capable of understanding their relations to their white neighbors, and that they would be likely to take a sensible view of any proposition for a change of the boundaries of their reservation which public necessity or convenience would seem to require, and at the same time to show that they are deserving of fair and honest treatment from the whites.

The one thing that has given them trouble has been the fear of losing their homes. They have watched the progress of white settlement in the surrounding country, the discovery of valuable mines, the building of railroads, etc., and all this has made them apprehensive lest in some way their reservation might be wrested from them.

In 1884 their agent reported as follows:

The rapid progress they are making, and the great interest manifested by them in their farm work, in their

fences, cultivation, in improving the breed of their horses and cattle, and in fact in all things, is commendable.

It was feared in the early spring that the great rush to the Coeur d'Alene gold mines would cause considerable trespassing upon their reserve, but happily so many other routes were opened to them that there were but few crossing the reserve, and now it has nearly ceased.

And again in 1885:

The Coeur d'Alenes on the Coeur d'Alene Reserve in Idaho are flourishing in the highest degree, being wholly independent of the Government, save in the support of their schools and the instruction they receive from their farmer. What they most dread is that their lands will be taken from them some day by the whites, or they be forced to take up small allotments, while now many of them have large fields inclosed with post and board fences, or good substantial rails. Some half-dozen of them have 200 acres of land under cultivation.

And in 1886:

There has been much talk of late by the whites of having their reserve thrown open to settlement, which has troubled Saltice, their chief, very much. He, however, felt somewhat satisfied when I assured him that if such steps were taken by the Government he and his people would receive their land in severalty before the whites would be permitted to enter.

I have taken some pains to ascertain, by reference to the correspondence and otherwise, whether the Indians, would be likely to consent to a reasonable reduction of their reservation, and I am satisfied that they would upon anything like just and reasonable terms, and my own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes

could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.

Just what portion of the reservation and navigable waters should be segregated from the reservation, I am unable to say. That, I think, should be determined by negotiations with the Indians.

As bearing upon the subject of the inquiries presented in the Senate resolution, I quote the following from the report of Inspector Gardner, already cited:

On the north and east side of the reserve (Coeur d'Alene) is a section of very mountainous country, known as "Wolf Lodge district." The Indians do not use this, and only occasionally go there hunting for elk and deer. The mountains in this district are said to contain large quantities of valuable minerals. Already prospectors have made their appearance and are only deterred from developing same by occasional presence of the military, who would eject them, and the agent would cause their arrest for trespassing on an Indian reservation. For farming, grazing, or, in fact, for any purpose whatever, this mountain district is approximately valueless to the Coeur d'Alene Indians, but could be advantageously utilized by the whites in developing the mineral resources of same. And, in view of these facts, I see no reason why proper legislation should not be had authorizing the Indians to dispose of their title to same to the United States.

I also quote the following from a report by Special Agent G.W. Gordon, of this Bureau, who visited the

Coeur d'Alene Indians upon official business in August last:

There is great eagerness on the part of the whites to locate mining claims on the mineral portion of the reserve, and especially in that section known as "Wolf Lodge," and we found mining claims numerously staked off in that section and in some cases notices posted, though we did not find the parties themselves on the reserve. These mining prospectors are constantly on this portion of the reserve, and it seems next to impossible to keep them off with the means at hand. They are doing no injury, however, further than simply locating mining claims with a view to their possession when that part of the reserve is opened to settlement, as it seems to be believed by them it will be at an early day.

It may be proper to add that the special agent found the Indians decidedly opposed to taking their lands in severalty under the general allotment act. This may be accounted for in part, I think, by the fact that some of them have individually much more land under cultivation than they would be entitled to under that act, and they naturally desire to keep all they have.

Upon this subject the special agent says:

While on the reserve we held a general and well attended council of the Indians, in order to obtain their views in regard to taking their lands in severalty, and after a clear understanding as to what was desired by the Government, they decided by a unanimous vote adversely to taking in severalty otherwise than they now hold them. These Indians, as you are doubtless aware, are settled on farms of their own selection, are self-supporting and making gratifying progress in agriculture, while they have good schools and their children generally being educated.

In conclusion I will state that in my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the executive order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim. This claim has been recognized in various ways and at sundry times, and the last Congress authorized the Secretary of the Interior to negotiate with them "for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States." Pursuant to that authority negotiations were conducted with them in March last and an agreement concluded, which is now before Congress for ratification. The agreement is published in House Ex. Doc. No. 63, Fiftieth Congress, first session, pp. 53-56.

It should be stated also that provision is made in said agreement for the removal and settlement upon the Coeur d'Alene Reservation of the Upper and Middle Bands of Spokane Indians, now residing in and around Spokane Falls in Washington Territory, and also the Calispels, now residing in the Calispel Valley, and any others of the non-reservation Indians belonging to the Colville Agency, and it is confidently hoped and expected that if the agreement is ratified and confirmed the Spokanes, numbering between 350 and 400 souls, will be removed and settled there.

However, there undoubtedly is an abundance of good farming land in the extreme southern portion of the reservation for all the Indians who will be likely to go there, and much to spare.

I think that when the present agreement shall have been ratified it will be an easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

In addition to the two maps spoken of in this report, I transmit herewith a tracing of the official map of the survey of "so much of the outboundaries of the Coeur d'Alene Indian Reservation in Idaho as are not marked by prominent natural boundaries and by the surveyed line between Idaho and Washington Territories" as surveyed in 1883 by Darius F. Baker, United States deputy surveyor.

A copy of this report is herewith inclosed, and also the Senate resolution.

Very respectfully, your obedient servant,

J.D. C. Atkins,

Commissioner.

The SECRETARY OF THE INTERIOR.

APPENDIX 7

Statutes at Large
From Dec. 1887 to March 1889, Vol. XXV
FIFTIETH CONGRESS. SESS. I.

* * *

[1888]

[p.160]

CHAP. 336. – An act granting to the Washington and Idaho Railroad Company the right of way through the Coeur d'Alene Indian Reservation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way is hereby granted, as hereinafter set forth, to the Washington and Idaho Railroad Company, a corporation organized and existing under the laws of the Territory of Washington, for the extension of its railroad through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation, beginning at a point on the westerly line of said reservation near the junction of the Washington and Idaho Railroad with the Idaho Branch of said road, near Lone Pine, in Washington Territory, and running thence in a northerly direction across the Coeur d'Alene Indian Reservation to a point near the mouth of the Saint Joseph's River, on the Coeur d'Alene Lake, thence in a northeasterly direction along the east side of the Coeur d'Alene Lake to the Coeur d'Alene River, and thence in a generally easterly direction, by the Coeur d'Alene Mission, to the east line of the reservation.

SEC. 2. That the right of way hereby granted to said company shall be seventy-five feet in width on each side of the central line of said railroad as aforesaid; and said company shall also have the right to take from said lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent of one station for each ten miles of road.

SEC. 3. That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof, and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of any kind shall vest in said railway company in or to any part of the right of way herein provided for until plats thereof, made upon actual survey for the definite location of such railroad, and including the points for station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, shall be filed with and approved by the Secretary of the Interior, which approval shall be made in writing and be open for the inspection of any party interested therein, and until the compensation aforesaid has been fixed and paid; and the surveys, construction, and operation of such railroad, including charges of transportation, shall be conducted with due regard for the rights of the Indians, and in accordance

with such rules and regulations as the Secretary of the Interior may make to carry out this provision: *Provided*, That the consent of the Indians to said right of way shall be obtained by said railroad company in such manner as the Secretary of the Interior shall prescribe, before any right under this act shall accrue to said company.

SEC. 4. That said company shall not assign or transfer or mortgage this right of way for any purpose whatever until said road shall be completed: *Provided*, That the company may mortgage said franchise, together with the rolling-stock, for money to construct and complete said road: *And provided further*, The right granted herein shall be lost and forfeited by said company unless the road is constructed and in running order across said reservation within two years from the passage of this act.

SEC. 5. That said railway company shall accept this right of way upon the express condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided: *Provided*, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this act.

SEC. 6. That Congress may at any time amend, add to, alter, or repeal this act.

Received by the President, May 18, 1888.

[NOTE BY THE DEPARTMENT OF STATE. - The foregoing act having been presented to the President of the United States for his approval and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]

APPENDIX 8

Statutes at Large
From Dec. 1887 to March 1889, Vol. XXV
FIFTIETH CONGRESS. SESS. II.

[1889]

* * *

[p. 980]

CHAP. 412. – An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department for the year ending June thirtieth, eighteen hundred and ninety, and fulfilling treaty stipulations with the various Indian tribes, namely:

* * *

[p. 996]

GENERAL INCIDENTAL EXPENSES OF
THE INDIAN SERVICE.

* * *

[p. 997]

Incidental expenses of Indian service in Washington Territory: For general incidental expenses of the Indian service, including traveling expenses of agents at seven agencies, and the support and civilization of Indians at Colville and Nisqually Agencies, and pay of employees, including a physician for Coeur d'Alene Reservation, sixteen thousand dollars.

* * *

[p. 997]

MISCELLANEOUS.

* * *

[p. 1002]

SEC. 4. That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress and for the purpose of such negotiation, the sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated; the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

* * *

APPENDIX 9

Annual Report (1890) of the
Commissioner of Indian AffairsREPORT
of
THE COMMISSIONER OF INDIAN AFFAIRS.
45300DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, September 5, 1890.

The SECRETARY OF THE INTERIOR:

SIR: I have the honor to submit the fifty-ninth annual
report of the Commissioner of Indian Affairs.

IN GENERAL

* * *

TITLE TO EXISTING INDIAN RESERVATIONS.

The Indian title has been extinguished to all the public domain, except Alaska, and the portion included in one hundred and sixty-two Indian reservations, not embracing those in New York already referred to nor that occupied by the Cherokees in North Carolina, and by the Sacs and Foxes in Iowa, both of which were acquired by purchase.

Of these one hundred and sixty-two reservations there were established -

By executive order	56
By executive order under authority of act of Congress	6
By act of Congress	28

By treaty, with boundaries defined or enlarged by executive order	15
By treaty or agreement and act of Congress	5
By unratified treaty	1
By treaty or agreement	51
Total	162

Reservations by Executive Order. - Of the fifty-six established by executive order, the title has not been held to be permanent, but the land has been subject to restoration to the public domain at the pleasure of the President. Under the general allotment act, however, of 1887 (24 Stats, p. 388) the tenure has been materially changed and all reservations, whether established by Executive order, act of Congress, or treaty, are held to be permanent.

The permanency of this tenure is further shown by the act of Congress authorizing and directing the Secretary of the Interior to negotiate with the Coeur d'Alene tribe of Indians in Idaho for the purchase and release of a portion of their reservation, which was established by executive order, (see Indian appropriation act. 1889, 25 Stats. p. 1002); also by the act ratifying agreement of May 14, 1880, whereby the Shoshone, Bannack, and Sheepeater Indians of the Lemhi Indian Reservation surrender for a valuable consideration that executive order reserve.

APPENDIX 10

Statutes At Large

From Dec. 1889 to March 1891, Vol. XXVI
FIFTY-FIRST CONGRESS SESS. II.

[1891]

* * *

[pp. 1026-1032]

SEC. 19. The following agreement entered into on the part of the United States by John V. Wright, Jared W. Daniels and Henry W. Andrews, Commissioners with the Coeur d'Alene Indians in Idaho Territory signed on the part of said Indians by Chief Andrew Seltice, and others which bears date March twenty-sixth, eighteen hundred and eighty-seven, and now on file in the Interior Department, is hereby accepted, ratified, and confirmed and is in the following words, to-wit:

AGREEMENT WITH COEUR D'ALENE.

This agreement made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eight-seven, and for other purposes," approved May fifteenth, eighteen hundred and eighty-six, by John V. Wright, Jared W. Daniels, and Henry W. Andrews, duly appointed commissioners on the part of the United States and the Coeur d'Alene tribe of Indians now residing on the Coeur d'Alene Reservation, in the

Territory of Idaho, by their chiefs, headmen, and other male adults, whose names are hereunto subscribed, they being duly authorized to act in the premises, witnesseth:

ARTICLE 1.

Whereas said Coeur d'Alene Indians were formerly possessed of a large and valuable tract of land lying in the Territories of Washington, Idaho, and Montana, and whereas said Indians have never ceded the same to the United States, but the same, with the exception of the present Coeur d'Alene Reservation, is held by the United States and settlers and owners deriving title from the United States, and whereas said Indians have received no compensation for said land from the United States: Therefore,

ARTICLE 2.

For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

ARTICLE 3.

The said Coeur d'Alene Indians agree and consent that the Upper and Middle bands of Spokane Indians residing in and around Spokane Falls, in the Territory of

Washington, may be removed to the Coeur d'Alene Reservation and settled thereon in permanent homes on the terms and conditions contained in an agreement made and entered into by and between John V. Wright, Jared W. Daniels, and Henry W. Andrews, commissioners on the part of the United States and said Spokane Indians, concluded on the fifteenth day of March, eighteen hundred and eighty-seven, at Spokane Falls, in the Territory of Washington.

ARTICLE 4.

And it is further agreed that the tribe or band of Indians known as Calespels, now residing in the Calespel Valley, Washington Territory, and any other bands of non-reservation Indians now belonging to the Colville Indian Agency, may be removed to the Coeur d'Alene Reservation by the United States, on such terms as may be mutually agreed on by the United States and any such tribes or bands.

ARTICLE 5.

In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity: and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

ARTICLE 6.

And it is further agreed that the United States will expend for the benefit of said Coeur d'Alene Indians the sum of one hundred and fifty thousand dollars, to be expended under the direction of the Secretary of the Interior, as follows: For the first year, thirty thousand dollars, and for each succeeding year for fifteen years, eight thousand dollars. As soon as possible after the ratification of this agreement by Congress, there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed, miller to be paid out of the funds herein provided. The remaining portion of said thirty thousand dollars, if any, and the other annual payments shall be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, parties hereto.

ARTICLE 7.

It is further agreed that if it shall appear to the satisfaction of the Secretary of the Interior that in any year in which payments are to be made as herein provided said Coeur d'Alene Indians are supplied with such useful and necessary articles and do not need the same, and that they will judiciously use the money, then said payment shall be made to them in cash.

ARTICLE 8.

It is further agreed that any money which shall not be used in the purchase of such necessary articles or paid over, as provided in article seven, shall be placed in the Treasury of the United States to the credit of the said Coeur d'Alene Indians, parties hereto, and expended for their benefit, or paid over to them, as provided in the foregoing articles.

ARTICLE 9.

It is further agreed that in the purchase for distribution of said articles for the benefit of said Indians the wishes of said Indians shall be consulted as to what useful articles they may need, or whether they need any at all, and their wishes shall govern as far as it is just and proper.

ARTICLE 10.

It is further agreed that in the employment of engineers, millers, mechanics, and laborers of every kind, preference shall be given in all cases to Indians, parties hereto, qualified to perform the work and labor, and it shall be the duty of all millers, engineers, and mechanics to teach all Indians placed under their charge their trades and vocations.

ARTICLE 11.

It is further agreed that in addition to the amount heretofore provided for the benefit of said Coeur d'Alene Indians the United States, at its own expense, will furnish

and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

ARTICLE 12.

In order to protect the morals and property of the Indians, parties hereto, no female of the Coeur d'Alene tribe shall be allowed to marry any white man unless, before said marriage is solemnized, said white man shall give such evidence of his character for morality and industry as shall satisfy the agent in charge, the minister in charge, and the chief of the tribe that he is a fit person to reside among the Indians; and it is further agreed that Stephen E. Liberty, Joseph Peavy, Patrick Nixon, and Julien Boutelier, white men who have married Indian women and with their families reside on the Coeur d'Alene Reservation, are permitted to remain thereon, they being subject, however, to all laws, rules, and regulations of the Commissioner of Indian Affairs applicable to Indian reservations.

ARTICLE 13.

It is further agreed and understood that in consideration of the amount expended in buildings and other improvements on said Coeur d'Alene Reservation for religious and educational purposes by the De Smet Mission, and valuable services in the education and moral training of children on said reservation, and in consideration that the Indians, parties hereto, have donated for said purposes one section of land on which is situated the boys school, one section on which is situated the girl's

school, and one section of timbered land for use of the schools, that said De Smet Mission and its successors may continue to hold and use said three sections of land and the buildings and improvements thereon so long as the same shall be used by said De Smet Mission and its successors for religious and educational purposes.

ARTICLE 14.

This agreement shall not be binding on either party until ratified by Congress.

In testimony whereof the said John V. Wright, Jared W. Daniels, and Henry W. Andrews, on the part of the United States, and the chiefs, headmen, and other adult Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission on the Coeur d'Alene Reservation, in the Territory of Idaho, on this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

SEC. 20. That the following agreement entered into with the said Coeur d'Alene Indians by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, Commissioners on the part of the United States, signed by said Commissioners and by said Andrew Seltice, Chief, and others, on the part of said Indians, which agreement bears date September ninth, eighteen hundred and eighty-nine, and is now on file in the Interior Department, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

AGREEMENT.

This agreement, made pursuant to an item of an Act of Congress, namely; Section 4 of the Indian appropriation act, approved March two, eighteen hundred and eighty-nine, (25 Stat., 1002), by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, duly appointed commissioners on the part of the United States, parties of the first part, and the Coeur d'Alene tribe of Indians, now residing on the Coeur d'Alene Reservation in the Territory of Idaho, by their chiefs, headmen, and other male adults whose names are hereunto subscribed, parties of the second part witnesseth:

ARTICLE 1.

For the consideration hereinafter named the said Coeur d'Alene Indians hereby cede, grant, relinquish and quitclaim to the United States, all the right, title, and claim which they now have, or ever had, to the following-described portion of their reservation, to wit: Beginning at the northeast corner of the said reservation, thence running along the north boundary line north sixty-seven degrees twenty-nine minutes west to the head of the Spokane River; thence down the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation; thence northerly

along the said east boundary line to the place of beginning.

ARTICLE 2.

And it is further agreed, in consideration of the above, that the United States will pay to the said Coeur d'Alene tribe of Indians the sum of five-hundred thousand dollars, the same to be paid to the said Coeur d'Alene tribe of Indians upon the completion of all the provisions of this agreement.

ARTICLE 3.

It is further agreed that the payment of money aforesaid shall be made to the said tribe of Indians pro rata or share and share alike for each and every member of the said tribe as recognized by said tribe now living on said reservation.

ARTICLE 4.

It is further agreed and understood that this agreement shall not be binding on either party until the former agreement now existing between the United States by the duly-appointed commissioners and the said Coeur d'Alene tribe of Indians, bearing date March twenty-sixth, eighteen hundred and eighty-seven, shall be duly ratified by Congress; and in the event of the ratification of the aforesaid agreement of March twenty-sixth, eighteen hundred and eighty-seven, then this agreement to be and remain in full force and effect but not binding on either party until ratified by Congress. In witness

whereof the said Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission, on the Coeur d'Alene Reservation, in the Territory of Idaho, this the 9th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

SEC. 21. That for the purpose of carrying into effect the provisions of said two agreements with said Coeur d'Alene Indians there are hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, in the manner and for the purpose as hereinafter specifically stated the following sums, to wit: For the first installment of one hundred and fifty thousand dollars, as provided for in article six of the first of said agreements, thirty thousand dollars, to be expended for the building and erection on said Coeur d'Alene Indian Reservation of a saw and grist mill, to be operated by steam, and for the payment of the wages of the engineer and miller to be employed in said mill, respectively, the remaining portion of said thirty thousand dollars, if any, to be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, all of said articles to be purchased, and said engineer and miller to be employed as near as may be in strict conformity with articles nine and ten of the first of said agreements. And for the purpose of meeting the requirements of articles two and three of the second agreement aforesaid the sum of five hundred thousand dollars is hereby

appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid by the United States to the said Coeur d'Alene tribe of Indians upon their compliance with all the provisions of the said second agreement hereinbefore recited, the same to be paid to the said tribe of Indians pro rata, or share and share alike, for each and every member of the said tribe as recognized by said tribe now living on said reservation.

SECTION 22. That all lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted or reserved from entry or location, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law, except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply, and under the law relative to town sites or to locators or purchasers under the mineral laws of the United States: *Provided*, That each settler or purchaser under and in accordance with the provisions of said homestead act, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, one-half of which shall be paid within two years; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged, except as to the said sum to be paid as aforesaid: *Provided further*, That the Secretary of the Interior shall cause to be surveyed for and patented to

Frederick Post, upon his making final proof of all thereof before the register and receiver of the proper United States land office, and to the satisfaction of the Commissioner of the General Land office and Secretary of the Interior, and paying therefor two dollars and fifty cents per acre and the cost of making such survey of such portion of said reservation as is recited in the agreement in word and figures as follows, to wit:

"Know all men by these presents that I, Andrew Seltice chief of the Coeur d'Alene Indians, did on the first day of June, A.D. eighteen hundred and seventy-one, with the consent of my people, when the country on both sides of the Spokane River belonged to me and my people, for a valuable consideration sell to Frederick Post the place now known as Post Falls, in Kootenai County, Idaho, to improve and use the same (water-power); said sale included all three of the river channels and islands, with enough land on the north and south shores for water-power and improvements; and have always protected the said Frederick Post, for eighteen years, in the rights there and then conveyed, and he has always done right with me and my people. We, the chiefs of the Coeur d'Alenes, have signed articles of agreement with the Government to sell the portion of the reservation joining Post Falls, in which we have excepted the above-prescribed rights, before conveyed to Frederick Post, and no Indian and no white man except Frederick Post have any rights on the above-described lands and river channels; the said Frederick Post has fulfilled all of his agreements with me and my people by improving the water-power and building mills at great expense, and I hereby authorize him to

build a house and take full possession of the above-described lands on the reservation side, so that when the treaty is confirmed he may have full possession and protection of the Government in the same.

"Given under my hand and seal this 16th day of Sept'r., A.D. 1889.

his
"ANDREW X SELTICE.
mark.

APPENDIX 11
1908 Annual Report of the
Department of the Interior, Volume 1

* * *

[pp.92-93]

BIRD RESERVATIONS.

Since March 13, 1903, 16 reservations for the protection of native birds have been created by Executive order, on recommendation of the Department, after a careful consideration and presentation of each case by this Bureau. These reserves have been created in response to a widespread popular and economic demand, made not only by the students of wild-bird life but also by the farmer and the sportsman and by a numerous and scattered citizenship, which, in a broad sense, is interested in conserving the nation's resources. No reserve has been created without securing, first, a full knowledge of ornithological conditions, and second, determining the character of the lands and their availability for bird reservation purposes. As a rule these lands are unfitted for agricultural, commercial or defensive purposes, the exceptions being noted in the modified form of order issued.

For convenience the bird reserves may be placed in three general groups, viz, the Florida and Gulf coast reserves, the reserves in the Northern States and those in the Pacific coast States.

The first group embraces nine reservations: Pelican Island, Breton Islands, Passage Key, Indian Key, Tern

Islands, Shell Keys, East Timbalier Island, Mosquito Inlet, and Tortugas Keys, which are scattered along the Atlantic and Gulf coasts from the middle of eastern Florida to western Louisiana. Upon these reserves thousands of many species of water birds nest, among which are brown pelicans, gulls and terns, black skimmers, cormorants, herons, etc.; and the Breton Island reserve, in addition, is the winter home of myriads of edible wild ducks.

The second group embraces three reservations: Stump Lake in North Dakota, and Huron Islands and Siskiwit Islands in Lake Superior, Michigan. Upon the Michigan reserves thousands of gulls and terns, and in the North Dakota reserve Canada geese, wild ducks, white pelicans, gulls, terns, and shore birds breed.

The third group embraces four reservations: Three Arch Rocks, Flattery Rocks, Quillayute Needles, and Copalis Rocks, islands located off the coasts of Washington and Oregon. Upon the coast islands thousands of murre, cormorants, petrels, puffins, gullemots, oyster catchers, and other characteristic sea birds breed.

On the majority of the reserved sites extermination by plume and cold-storage hunters was being pushed to a successful conclusion up to the date of reservation, but an effective warden service has eliminated this danger, and is greatly assisting in the preservation of an avifauna necessary to the welfare of the people.

1909 Annual Report of the
Department of the Interior

[pp.43-44]

BIRD RESERVES.

Reservations for the protection of native wild birds have been created by executive order, as follows:

Bird reserves created.

Name of Reservation	Date.	Location.	Acres.
Pelican Island	Mar. 14, 1903	East Florida coast	5.50
Breton Islands	Oct. 04, 1904	S.E. coast of Louisiana	Unknown
Stump Lake	Mar. 09, 1905	North Dakota	27.39
Huron Islands	Oct. 10, 1905	Lake Superior, Michigan	Unknown
Siskiwiik Islands	do	do	Unknown
Passage Key	Oct. 10, 1905	Tampa Bay, Florida	88.37
Indian Key	Feb. 10, 1906	do	90.00
Tern Islands	Aug. 08, 1907	Mouths of Mississippi River, Louisiana	Unknown
Shell Keys	Aug. 17, 1907	South Louisiana coast	Unknown
Three Arch Rocks	Oct. 14, 1907	West Oregon coast	Unknown
Flattery Rocks	Oct. 23, 1907	West Washington coast	Unknown
Quillayute Needles	do	do	Unknown
Copalis Rock	do	do	Unknown
East Timbalier Island	Dec. 17, 1907	South Louisiana coast	Unknown
Mosquito Inlet	Feb. 24, 1908	East Florida coast	Unknown
Tortugas Keys	Apr. 6, 1908	Florida Keys, Florida	Unknown
Klamath Lake	Aug. 8, 1908	Oregon and California	Unknown
Key West	do	Florida Keys, Florida	Unknown
Lake Malheur	Aug. 13, 1908	Oregon	Unknown
Chase Lake	Aug. 26, 1903	North Dakota	Unknown
Pine Island	Sept. 13, 1908	West Florida coast	Unknown
Matlacbu Pass	Sept. 26, 1908	do	Unknown
Palma Soda	do	do	Unknown
Island Bay	Oct. 23, 1908	Florida	Unknown
Loch Katrina	Oct. 26, 1908	Wyoming	Unknown
East Park	Feb. 23, 1909	California	Unknown

Cold Springs	do	Oregon	Unknown
Shoshone	do	Wyoming	Unknown
Pathfinder	do	do	Unknown
Bellefourche	do	South Dakota	Unknown
Strawberry Valley	do	Utah	Unknown
Salt River	do	Arizona	Unknown
Deer Flat	do	Idaho	Unknown
Minidoks	do	do	Unknown
Willow Creek	do	do	Unknown
Carlsbad	do	New Mexico	Unknown
Rio Grande	do	do	Unknown
Keechelus Lake	do	Washington	Unknown
Kachess Lake	do	do	Unknown
Cleatun Lake	do	do	Unknown
Bumping Lake	do	do	Unknown
Conconully	do	do	Unknown
Yukon Delta	Feb. 27, 1902	Alaska	Unknown
Bering Sea	do	do	Unknown
Pribilof	do	do	Unknown
Tuxedul	do	do	Unknown
St. Lazarin	do	do	Unknown
Farallon	do	California	Unknown
Culebra	do	Porto Rico	Unknown
Hawaiian Islands	Feb. 3, 1909	Hawaii	Unknown
Bugolot	Mar. 2, 1909	Alaska	Unknown

APPENDIX 12

1913 Annual Report of the
Commissioner of Indian Affairs
(For the Fiscal Year Ended June 30, 1913)
(Itemizing the Ninety-Nine Indian Reservations
Set Apart by Executive Order)

* * *

[p. 70]

TABLE 7 – *General data for each Indian reservation, under what agency or school, tribes occupying or belonging to it, area not allotted or specially reserved, and authority for its establishment, to Nov. 3, 1913.*

* * *

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Coeur d'Alene Executive orders, June 14, 1867, and Nov. 8, 1873; agreements made Mar. 26, 1887, and Sept. 9, 1889, and confirmed in Indian appropriation act approved Mar. 3, 1891, vol. 26 pp. 1026, 1029. Agreement, Feb. 7, 1894, ratified by act of Aug. 15, 1894, vol. 28, p. 322. 638 Indians have been allotted 104,077 acres and 1,906.99 acres have been reserved for agency, school, and church purposes and for mill sites. (See 86950-1908, and acts of June 21, 1906 (34 Stat. L., 325-355), Mar. 3, 1891 (26 Stat. L., 1026-1029), Aug. 15, 1894 (28 Stat. L., 322), Mar. 27, 1908 (35 Stat. L., 56), Apr. 30, 1909 (35 Stat. L., 78.) President's proclamation issued May 22, 1909, opening 224,210 acres surplus lands to settlement. (37 L.D., 698)

13
No. 94-1474

Supreme Court, U.S.

FILED

AUG - 5 1996

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1995

IDAHO, et al.,

Petitioners,

v.

COEUR d'ALENE TRIBE OF IDAHO, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF

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ARGUMENT

A. Eleventh Amendment Concerns Cannot Be Circumvented Simply By Dismissing The State As A Nominal Party.

The Eleventh Amendment is a cornerstone of our constitutional structure. It stands for the "constitutional principle that state sovereign immunity limit[s] the federal courts' jurisdiction under Article III." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1127 (1996). The Amendment's preservation of the balance between state and federal authority has withstood numerous challenges before this Court. The Coeur d'Alene Tribe, in its responsive brief, mounts the latest challenge against the Eleventh Amendment by proposing that the legal fiction of *Ex parte Young*, 209 U.S. 123 (1908), be elevated to the lofty heights of unassailable doctrine. In the process, it forgets *Young* is a narrow exception to Eleventh Amendment immunity that must be examined critically in every case where its application is proposed in order to avoid intruding on the sovereignty of the states.

In *Florida Dept. of State v. Treasure Salvors, Inc.*, eight members of the Court agreed that the Eleventh Amendment forbids federal courts from adjudicating a state's interest in property without the state's consent. 458 U.S. 670, 682, 703 (1982). The Ninth Circuit Court of Appeals held, and the Tribe argues, that this principle is fulfilled in this case by limiting the determination of title to "the Tribe's ownership interest against the rest of the world other than Idaho and its agencies." Tribe's Brief at 15.

The Tribe proposes that so long as the state is not a nominal party to an action determining title to property claimed by the state, there are no Eleventh Amendment concerns. The Tribe's argument hails back to the long-discarded rule of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), wherein the Court held that the Eleventh Amendment is "limited to those suits in which a state is a party on the record." 22 U.S. (9 Wheat.) at 857.

It is now well-established, however, that "the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record." *Poindexter v. Greenhow*, 114 U.S. 270, 287 (1885). Instead, "the general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984). In other words, *Treasure Salvor's* prohibition on the adjudication of state title to property cannot be satisfied by dismissing the state as a nominal party if the relief sought by the plaintiff nonetheless has the effect of adjudicating the state's title.

In this case, the only supportable conclusion is that the relief sought by the Tribe will have the effect of adjudicating Idaho's title to the disputed submerged lands. As more fully explained in the state's opening brief, adjudication of this case begins from the strong presumption that the state has title to the disputed submerged lands. *Montana v. United States*, 450 U.S. 544, 552-54 (1981). Even in the absence of the state as a nominal party, the Tribe cannot disprove the presumption of state ownership without adjudicating the state's claim to the disputed submerged lands.

The Tribe attempts to dodge this issue by stressing that it will amend its complaint so that the only relief it obtains is a decree of its rights and an injunction requiring state officers to act in accordance with those rights. The drafters of the Eleventh Amendment, however, did not intend a state's sovereign immunity to be subverted through artful pleading. It is always necessary to go below the surface of the pleading and examine the true nature of the claims. In this case, because of the presumption of state title, the competing claims of the state and the tribe form a zero-sum game: the trial court must decree that the state *is not* the owner in order to decree that the Tribe *is* the owner.

The Tribe further contests the need to adjudicate the state's claim by inferring that the only question it seeks to adjudicate is whether the United States reserved or conveyed

title to the Tribe. The implication is that because the alleged conveyance occurred prior to Idaho's admission to the Union, the court need not determine whether title passed to Idaho upon its admission. Such an argument ignores the fundamental fact that during the territorial period the United States held the disputed submerged lands in trust for the future state of Idaho. *Shively v. Bowlby*, 152 U.S. 1, 49, 57 (1894). In order to prevail, the Tribe must prove that the United States made an affirmative decision to defeat the state's title by conveying it to the Tribe. As the beneficiary of the trust taken on by the United States, any allegation that the United States undertook to convey the trust property to the Tribe necessarily adjudicates the state's claims to the property.

B. Suits Against Federal Officers Provide Valuable Guidance In Eleventh Amendment Cases Because The Underlying Principles Of Sovereign Immunity Are Identical.

The Tribe asserts that Idaho errs by looking to suits against federal officers for guidance in determining whether an action is in effect against the state. In the Tribe's view, actions against state officers alleged to be in violation of federal law cannot be compared to actions against federal officers because of the need to protect the supremacy of federal laws. The Tribe interprets *Young* as a per se rule that allows plaintiffs to escape the restrictions of the Eleventh Amendment through the simple step of alleging violations of federal law by state officers. In the Tribe's view, once it is alleged that an officer is in violation of federal law, the court need inquire no further.

First, the Tribe's fundamental premise, that it seeks to vindicate the supremacy of federal law over state law, fails. As noted more fully in the state's opening brief, the claims of both the state and the Tribe originate in federal law. Even supposing that the Tribe is correct in characterizing this as a supremacy case, the Tribe ignores the fact that *Young* embodies a "balance of federal and state interests." *Papasan*

v. Allain, 478 U.S. 265, 277 (1986). The federal interest is the need to "vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Id.* at 277, quoting *Pennhurst*, 465 U.S. at 105. The states' interests include retaining their ability as sovereigns to determine where they may be sued and the circumstances under which they may be sued, *Pennhurst*, 465 U.S. at 99, and avoiding "the problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Pennhurst*, 465 U.S. at 100. Because of the need to maintain the balance of interests, the line between permitted and prohibited suits is not as bright as the Tribe believes. Some cases "formally meet the *Young* requirements" but nonetheless stretch *Young* beyond its allowable limits. *Papasan*, 478 U.S. at 277.¹

Because *Young* is a balancing test, a federal court cannot rely on the mere fact that the plaintiff alleges a violation of federal law by state officers. The court must always examine the relief sought to determine whether the relief is of such a nature that it involves the state as a real and substantial party in interest. "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Pennhurst*, 465 U.S. at 101, quoting *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per

¹ Because *Young* is an exception to state sovereign immunity, the Tribe and its amici are simply wrong when they describe the state as seeking an "exception" to *Young*. Rather, the state simply asserts that the relief sought by the Tribe falls outside the narrow bounds of the *Young* exception. Likewise, the Tribe and its amici are wrong when they infer that to rule in Idaho's favor the Court must overrule decisions such as *Tindal v. Wesley*, 167 U.S. 204 (1897), which allowed a suit against state officers for possession of lands seized by state officers pursuant to state laws. *Tindal* has been "clarified" by *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), and the principles espoused by Idaho are consistent with *Larson*. Moreover, this case is distinguished from *Tindal* and similar decisions because, in the unique circumstances present in an equal footing case, it is impossible to proceed without adjudicating the state's title.

curiam). If relief operates directly against the state it is barred, regardless of the nature of the relief sought. "[W]e have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 (1996).

The determination of whether relief operates against the sovereign is inherent to all suits involving sovereign immunity, whether those suits involve state or federal officers. Thus, in construing state sovereign immunity, this Court has often looked to federal officer suits for guidance, and vice versa. A primary example is *Treasure Salvors* itself, where the Court, in determining the scope of Eleventh Amendment immunity, turned for guidance to *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), an action against federal officers. In turn, the *Treasure Salvors* Court noted that *Larson* "clarified" previous Eleventh Amendment decisions such as *Tindal v. Wesley*, 167 U.S. 204 (1897). 458 U.S. at 688.² Thus, it is entirely appropriate to turn to federal officer suits for guidance in determining "whether the relief sought against the officer is not, in substance, sought against the sovereign." *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952).³ Indeed, the Court should be hesitant to violate the principles of federalism embodied in the Eleventh Amendment by adopting a rule of immunity for state officers that is less protective of state sovereignty than the rules of immunity adopted for the protection of federal sovereignty.

² *Larson* itself looked to Eleventh Amendment decisions in determining the scope of federal sovereign immunity. See *Larson*, 337 U.S. at 691 n.11, discussing *North Carolina v. Temple*, 134 U.S. 22 (1890); 337 U.S. at 698 n.20, discussing *Tindal v. Wesley*, 167 U.S. 204 (1897); and 337 U.S. at 699 n.22, discussing *Poindexter v. Greenhow*, 114 U.S. 270 (1884).

³ Notably, *Redwine*, an Eleventh Amendment decision addressing an alleged violation of federal constitutional rights, cited *Larson* as authority for the quoted principle. 342 U.S. at 304.

C. The Question Of Whether An Action Will Adjudicate State Claims To Property Must Be Addressed Regardless Of Whether The Plaintiff Alleges A Violation Of State Or Federal Law.

The Tribe argues that federal courts need only determine the effect of injunctive relief on state claims to property when the plaintiff alleges that a state officer's actions are *ultra vires* his statutory authority. The Tribe would do away with the need to determine the effect of injunctive relief on state claims to property where the plaintiff alleges that the officer's actions violate federal law.

The primary focus of the analysis adopted in *Treasure Salvors*, however, is to determine whether proceeding against state officers will, in substance and effect, operate against the state. This concern applies equally to all suits against state officers involving title to property, whether the officer's possession of the property is alleged to be *ultra vires* his authority or in violation of federal law. The Eleventh Amendment bars all actions against the state itself, regardless of the nature of the violations alleged in the complaint. *Seminole*, 116 S. Ct. at 1124.

The Tribe's primary mistake is in making a negative inference from the fact that in actions alleging that state officers are acting in violation of state law, the balance of interests falls on the side of protecting state sovereignty, and the court is relieved of the need to reconcile competing state and federal interests. *Pennhurst*, 465 U.S. at 106. That does not necessarily infer, however, that in an action alleging a violation of federal law by state officers that the court is relieved of the responsibility of determining whether the requested relief will operate, in substance, against the state. As this Court noted in *Pennhurst*, "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." 465 U.S. at 105. Thus, if anything, the need to determine whether the requested relief will require adjudication of state claims to disputed property is even greater in cases alleging a violation of federal law,

since it is in those cases where the balance of state and federal interests is directly at issue.

The nature of the state's claim to property is a factor in determining whether the action is in substance against the state. The Tribe denies that its action is in substance against the state because it denies that the state has title or even color of title to the disputed submerged lands. Instead, it asserts that the presumption of state title is merely a rebuttable presumption. The presumption of state title to submerged lands, however, is not a mere evidentiary rule, it is substantive law upon which the states are entitled to rely in exercising their sovereignty. The presumption does not go into effect only when a suit is filed to determine title to submerged lands; it is a principle that finds application immediately upon the state's admission to the Union. Upon admission, the state is presumed to possess title to all submerged lands within its boundaries, and may act on that presumption until such time as title to specific submerged lands is defeated through an appropriate court action.

This principle is demonstrated by the fact that Idaho state court decisions have recognized state title and public rights in the disputed submerged lands. In *Burrus v. Edward Rutledge Timber Co.*, 202 P. 1067 (Idaho 1921), the Idaho Supreme Court recognized state title to the submerged lands of Lake Coeur d'Alene and the corresponding right of public navigation. In *Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1985), the Idaho Supreme Court again recognized state title to the submerged lands of Lake Coeur d'Alene, and confirmed the state's lease of a portion of the lakebed for the construction of a marina.

Thus, this case presents a situation where the state has a judicially-recognized document of title, the Idaho Admission Act, which by operation of federal law is presumed to vest the state with title to submerged lands. The state is in possession of the disputed lands pursuant to that title. It is hard to imagine a clearer case for application of the Eleventh Amendment. Where, as here, the state has both documented title and

possession, the entire interest adverse to that of the plaintiff is that of the state. The acts of state officers play no part in the critical issue, which is to determine in which party title resides. In order to proceed, the plaintiff must overcome the state's title and prove that title should be vested in the plaintiff, a result plainly prohibited by the Eleventh Amendment.

D. Because Of The Unique Nature Of Equal Footing Cases, It Was Proper To Dismiss The Tribe's Action Pursuant To A 12(b)(6) Motion.

The Tribe infers that the trial court erred by dismissing the action before the Tribe had an opportunity to present the merits of its case. It infers that the court's jurisdiction is dependent on the relative strength of the claims of the Tribe and the state, and therefore it was error to dismiss the case before the Tribe had an opportunity to present the facts underlying its claim.

Idaho does not, as the Tribe asserts, concede the necessity to reach the merits of this case in order to determine jurisdiction. Indeed, the thrust of Idaho's argument is that it is improper to reach the merits in order to determine jurisdiction because it essentially forces the state to appear and defend its claim, the very result the Eleventh Amendment is intended to avoid. It would make little sense to examine the respective claims of the Tribe and the state to the disputed submerged lands in order to determine jurisdiction. Instead, the court need only examine the nature of the issues presented to determine whether it is necessary to adjudicate the state's claimed title to the property in order to proceed.

In some unique cases, such as *Treasure Salvors*, the court may need to make a preliminary determination as to whether the state possesses colorable title, since the lack of colorable title may make it possible to proceed without adjudicating state claims. In an equal footing case, however, where the state is presumed to have title, the court need not inquire into

the validity of the state's title in order to make an Eleventh Amendment determination. Because of the equal footing presumption it is clear, even at the preliminary stages of the proceedings, that further proceedings will require the court to adjudicate the state's claim of title. In such instances, it is proper to dismiss the action through a rule 12(b) motion alleging a lack of jurisdiction. The relative strength or weakness of the facts supporting the Tribe's claim do not alter the fact that further proceedings would require adjudication of the state's claims to the disputed property.

E. The Tribe's Possession Of Sovereignty Gives It No Special Status For Eleventh Amendment Purposes.

The Tribe appears to allege that because it is a sovereign, the restrictions of the Eleventh Amendment should be relaxed. This identical argument was made and rejected in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). There, the Court confirmed that the Constitution embodies no waiver of state sovereign immunity for the benefit of tribal plaintiffs. *Id.* at 782. Indeed, it is difficult to imagine how a plaintiff's status affects the core question to be decided, which is whether the relief requested is, in substance, against the state. It is a simple function of the relief requested, and is independent of the Tribe's sovereignty.

F. The Administrative Decision Cited By The Tribe Was Withdrawn For Lack Of Jurisdiction And Because Of Substantive Error.

The Tribe infers that a 23 year-old decision of the Federal Energy Regulatory Commission (F.E.R.C.) is relevant to this Court's decision, and may even give the Tribe a colorable claim to title of the Lake. No credence can be given to such assertions in light of two important facts: (1) the state was not a party to the F.E.R.C. proceedings, and (2) the F.E.R.C. lacked the authority and expertise to make such a determination.

Furthermore, the Tribe fails to mention that prior to the order vacating the decision, the F.E.R.C. had requested that the case be remanded to the F.E.R.C. for reconsideration, based on the fact that the F.E.R.C. had misinterpreted the holding in *Buttz v. Northern Pacific Railroad Co.*, 119 U.S. 55 (1886), a decision the F.E.R.C. had mistakenly relied on for the proposition that executive agreements are effective upon ratification by the Tribe, not ratification by Congress. See 1988 W.L. 244511. Thus, the F.E.R.C. not only vacated its decision for lack of authority, it also called into question the substance of its prior holding. Under such circumstances, the Tribe is incorrect when it asserts that the F.E.R.C. proceedings were a "case in which the Tribe prevailed until the jurisdictional determination." Tribe's Brief at 5.

G. The Availability Of Alternative Remedies And Forums Is A Factor In Determining The Need To Protect Federal Supremacy.

The Tribe asserts that the availability of alternative remedies, such as an action in state court, has no bearing on whether the federal court should assume jurisdiction. *Young*, however, embodies a balance between the need to protect state sovereignty and the need to vindicate the supremacy of federal law. If there are alternative means available that will equally vindicate federal supremacy, it is axiomatic that the balance of interests falls on the side of protecting state sovereignty.

As noted above, supremacy concerns are absent in this case. But, assuming for purposes of argument that the Tribe's complaint adequately alleges violations of federal law, there are several alternatives available for vindicating the supremacy of that federal law. First, the Tribe could bring an action against the state in state court, where the state has waived its

immunity to quiet title actions.⁴ Second, the Tribe could petition the United States to bring an action on its behalf. In fact, as the Tribe notes, the United States has brought such an action, and the Tribe has successfully intervened in that action. Thus, there is an alternative means of protecting federal supremacy in this action, an alternative that, because of the presence of the United States, must be assumed to be at least as effective as the private lawsuit initiated by the Tribe.

Because the allegations of the Tribe's complaint are being addressed in a separate suit by the United States, the need to vindicate the supremacy of federal laws is fully met. It must be remembered that *Ex parte Young* is an exception to Eleventh Amendment immunity, *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), and is an exception based on necessity. *Pennhurst*, 465 U.S. at 105. Where, as here, the United States has stepped in and sued the state, the necessity for a private action against the state dissipates, and the balance of interests falls on the side of protecting against further and unnecessary intrusions on state sovereignty.⁵

⁴ The Tribe's suggestion of a suit in tribal court is not a viable alternative, since the state has not waived its sovereign immunity to such suits.

⁵ As to the majority of the submerged lands at issue in the Tribe's action, the United States itself recognizes the state's title. In its amicus brief, the United States concedes that the state owns the northern two-thirds of the Lake, which lie outside the current boundaries of the Coeur d'Alene Reservation. United States' Brief at 7, 21. It also concedes state ownership of the submerged lands within Heyburn State Park, which lies within the exterior boundaries of the Reservation. United States Brief at 8. Thus, supremacy concerns are altogether absent for such lands.

H. The Court Must Address The Adverse Effect On State Title Created By The Court Of Appeal's Decision On The Merits.

The Tribe and the United States, as amicus, assert that the Court should not reach the issue of whether the President had authority to convey the disputed submerged lands to the Tribe. The necessity for the Court to reach the merits of this issue turns upon the Court's decision regarding the application of the Eleventh Amendment to the action. If the Court concludes that the Tribe's case against the officers may proceed, then the executive order issue is properly before the Court and should be decided. On the other hand, if it is decided that the federal courts lack jurisdiction over this action, then the court of appeals' decision should, at a minimum, be vacated in a manner that assures it cannot be relied upon as authority in associated actions.

In other circumstances resulting in the mootness of a judgment while awaiting review, the Court has recognized that once Article III jurisdiction is found to no longer exist, it may not be appropriate to address the merits of the case, but the Court may nonetheless "make such disposition of the whole case as justice may require." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390 (1994), quoting *Walling v. Reuter Co.*, 321 U.S. 671, 677 (1944). The Court has also recognized that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." 115 S. Ct. at 391. In such cases, vacatur is the appropriate remedy.

In this case, the state, in its motion to dismiss, did not originally seek to argue the merits of the case. It sought dismissal solely for lack of jurisdiction. The state also asserted that the complaint failed to state a claim against the officers on the basis that the officers themselves held no title or interest in the disputed submerged lands, and therefore the alleged cloud on title could not be removed by proceeding against the state officers once the state was dismissed. Resp.

App. 16-17; Joint App. 16-19.⁶ The trial court denied the motion to dismiss the action against the state officers for lack of jurisdiction. It then, *sua sponte*, reached the merits of the case, and held that the Tribe failed to state a claim because it could not overcome the presumption of state title to the disputed submerged lands. Pet. App. at 46-47.

On appeal to the Ninth Circuit Court of Appeals, the Tribe necessarily responded to the trial court's ruling by asserting that it owned the disputed lands pursuant to aboriginal title, Idaho law, and the equal footing doctrine. The state was forced to respond to the merits despite its belief that the court lacked jurisdiction over the matter.

The court of appeals proceeded to reach the merits by deciding that the President had authority to defeat a state's equal footing entitlement without explicit congressional authorization. Pet App. 27. It additionally decided that executive orders allegedly setting aside submerged lands should be treated as conveyances of title to the affected Indian tribe, as opposed to normal reservations or withdrawals of public lands. Pet. App. 26.

Despite the fact that the Eleventh Amendment requires dismissal of this action, the Court should address the adverse effect the court of appeal's decision will have on the state's claims to the disputed submerged lands. By ruling as it did, the court of appeals has fundamentally shifted the balance of any future litigation and effectively denied the State an opportunity for appellate review if this case is dismissed on Eleventh Amendment grounds. Simple dismissal will not rectify the situation. The error of forcing the state to defend this case on the merits in contradiction to the terms of the Eleventh Amendment should not be compounded by forcing the state to deal with the consequences of an adverse decision on the merits of the case. At a minimum, the court of appeals'

⁶ "Resp. App." refers to the appendix in the Brief in Opposition to Petition for Writ of Certiorari. Citations to the "Pet. App." refer to the appendix in the Petition for Writ of Certiorari.

decision must be vacated in terms that make it clear that the decision is not to be relied upon in future actions regarding ownership of the disputed submerged lands.⁷

I. The President Lacked Authority To Convey The Disputed Submerged Lands As A Matter Of Law And Further Factual Development Is Not Required To Decide The Issue.

As noted above, if the Court determines that the Tribe's action against the state officers may proceed, it must determine whether the President has authority to convey the disputed submerged lands to the Tribe. Both the Tribe and the United States, as amicus, emphasize that the state has failed to provide any authority for the proposition that the President *cannot* convey submerged lands to Indian tribes. The real concern should be, however, that the court of appeals failed to cite to any authority stating that the President *can* convey submerged lands. The court of appeals forgets that the President is not a general sovereign, but can exercise only those powers vested in him by the Constitution or by statute. The court of appeals fails to cite to any constitutional or statutory provision authorizing the President to convey submerged lands. Instead, it relies solely on the fact that the Ninth Circuit has not denied tribal claims to riverbeds in previous cases "due to the lack of explicit congressional authorization to convey riverbeds." Pet. App. 27. •

Appellate court decisions that do not even purport to address the issue cannot serve as the genesis of presidential powers. If a federal court is to find that the President conveyed submerged lands to the Coeur d'Alene Tribe, it must, at

⁷ It should be noted that a disposition by this Court will not interfere, as the United States alleges, with the ongoing litigation initiated by the United States over ownership of a portion of the submerged lands at issue in this action. On the contrary, it is the court of appeals' decision that will interfere with the ongoing litigation by incorrectly finding authority to convey the disputed submerged lands to the Tribe.

the very least, identify a constitutional or statutory basis for the President's actions.

The Tribe's response perpetuates the court of appeals' error. The Tribe simply fails to identify any constitutional or statutory basis for the alleged conveyance of the disputed submerged lands. Instead, it asserts that the President can convey submerged lands under the criteria of *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), because there are submerged lands within the exterior boundaries of many executive order reservations. Otherwise, it attempts to avoid the issue by asserting that the question of whether a particular executive order conveys submerged lands is a factual question that cannot be resolved absent the presentation of further evidence. It also asserts the need for further factual development to demonstrate congressional ratification of the supposed conveyance.

First, the state does not dispute that the President created executive order reservations, nor does it dispute that there are submerged lands within the exterior boundaries of such reservations. However, the fact that submerged lands lie within the exterior boundaries of executive order reservations does not infer recognition of the authority to defeat state title to such submerged lands. In *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), the Court held that nothing can be inferred from the mere inclusion of submerged lands within the boundaries of a federal reservation. As the Court noted there, it would not be unusual for Congress to have "intended the State to hold title to the bed of a navigable lake wholly within the boundaries of an Indian Reservation." 482 U.S. at 202. In *United States v. Oregon*, 291 U.S. 1 (1935), the Court held that the submerged lands within the Lake Malheur Reservation, a wildlife refuge set apart by executive order, would pass to the state if the waters were navigable in fact. 295 U.S. at 6. Thus, the inclusion of submerged lands within executive order reservations infers neither the authority nor the intent to defeat state title to submerged lands. Also, the fact that executive order reservations may include a reservation of the

right to divert and use appurtenant waters, *Arizona v. California*, 373 U.S. 546, 598 (1963), does not infer the authority to convey submerged lands. Indeed, the *Arizona* Court distinguished the reservation of water rights from the reservation of title to submerged lands.⁸

Second, the President's authority to convey submerged lands is not a factual question dependent on the circumstances surrounding the creation of a particular reservation. If the President had authority to convey submerged lands, it is either the result of the President's inherent constitutional powers, the result of an express delegation of congressional authority, or the result of the general acquiescence to executive order reservations discussed in *United States v. Midwest Oil Co.* Either way, it is a question of law that can be decided without further factual development. Authority to convey submerged lands cannot be conferred on the President as a result of facts demonstrating his intent to do so. Nor can such authority be conferred on the President by facts demonstrating that the Tribe understood such to be the result of the President's actions. See *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947) (Indians' understanding could not confer on President "authority to convey title to them").

The more difficult issue presented by the Tribe and the United States is the assertion that the issue of the President's authority cannot be decided because a factual issue remains as to whether Congress "ratified" the President's actions after the fact by recognizing the Coeur d'Alene Reservation.

⁸ The Court held that a reservation of water rights could occur after the date of statehood, distinguishing *Shively v. Bowlby* and other equal footing cases finding that the government cannot convey submerged lands after they pass to the state. 373 U.S. at 598-99. The obvious inference is that the reservation of appurtenant waters for irrigation and other uses is not comparable to the reservation of title to submerged lands, and is not intrusive on the sovereignty of the state.

The state first notes that such an issue is outside the scope of the question which the Court agreed to review. The question presented by the state was limited to whether the President was authorized to convey title of submerged lands to the Coeur d'Alene Tribe. The question of whether Congress could later convey the submerged lands by "ratifying" an unauthorized conveyance is an entirely separate issue. Indeed, a ruling by this Court concerning the authority of the President would not foreclose consideration of the issue of later congressional conveyance were the case to be remanded to the trial court.⁹

The Tribe attempts to demonstrate the necessity to reach the issue by introducing evidence of congressional intent in the form of various congressional documents. Essentially, the Tribe attempts to try its case on the merits before this Court. The state contends, however, that this is not the proper forum to debate factual questions. Although the state possesses a large volume of material demonstrating the United States' lack of intent to convey submerged lands to the Tribe, the proper place to weigh this competing evidence is in front of a trial court with jurisdiction over all the parties.

Moreover, the material introduced by the Tribe is not relevant to the issue of whether submerged lands were conveyed to the Tribe. First, any ratification of an unauthorized conveyance would have to comply with the requirements of the *Montana* test, i.e., Congress' intent to convey the lands would have to be "definitely declared or otherwise made plain," and conveyance would have to be required by "some international duty or public exigency." *Montana v. United States*, 450 U.S. 544, 552 (1981). The bulk of the material cited by the Tribe, however, merely tends to demonstrate that Congress recognized the land set apart by the 1873 executive

⁹ Likewise, a ruling on the authority of the President to convey submerged lands will not affect the Tribe's ability to present, in the proper case, evidence relating to the Tribe's other theories, such as unextinguished aboriginal title or title under operation of state law.

order as a "reservation." The state does not dispute that the lands formed a reservation. Such a fact, however, is irrelevant to determining whether a conveyance of submerged lands occurred. This Court has held that the mere establishment of an Indian reservation does not operate "as a disposal of lands underlying navigable waters within its limits." *United States v. Holt State Bank*, 270 U.S. 49, 58 (1926).

The "ratification" advocated by the Tribe is also radically different from the principle of ratification inferred from *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872), which stated the general principle that treaties may convey to grantees good title without an act of Congress conferring it, but also noting that it was unnecessary to decide the issue because the treaty in question had been repeatedly recognized by Congress as valid. 84 U.S. (17 Wall.) at 247. *Holden* does not necessarily recognize the principle that Congress may "ratify" unauthorized actions. The title at stake in *Holden* was conferred through a treaty, which, as this Court has recognized, may grant title of Indian lands to individuals without any act of Congress. *Jones v. Meehan*, 175 U.S. 1, 10 (1899). It is axiomatic that the congressional action required to ratify an action that the President undertook pursuant to his constitutional authority is necessarily less exacting than the congressional action required to ratify an unauthorized Presidential action.

Additionally, the fact that Congress authorized compensation for the cession of lands for railroad right-of-ways, and later for a cession of a portion of the Reservation, does not demonstrate an intent to convey submerged lands to the Tribe. The Tribe contends it is relevant because it demonstrates that Congress believed the Tribe to possess compensable title to the lands within the 1873 Reservation. This may or may not be so. Congress may have simply wished to deal equitably with the Tribe.

Regardless, the Tribe's emphasis on whether the Tribe possessed compensable title is misplaced. In its opening brief, the state demonstrated that the general authority to withdraw

federal lands delegated to the President by acquiescence and discussed in *Midwest Oil*, is, as a matter of law, limited in its scope. This principle was demonstrated by reference to *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), wherein it was held that in exercising the powers delegated by acquiescence, the President lacked authority to convey compensable title to Indian tribes. *Id.* at 331. The state then asserted that if the President's authority was so limited in scope as to deny him the power to convey compensable title to uplands, it could not possibly extend to the conveyance of submerged lands, with its accompanying adverse effect on state sovereignty.

The state's argument does not infer that if, in the context of a specific reservation, the executive order was recognized as conveying compensable title to uplands that the President would automatically be recognized as having the authority to also convey submerged lands. The standard for a delegation of such power to the President is necessarily higher than for a delegation of the power to convey uplands because of the congressional policies strongly disfavoring conveyances of submerged lands. Additionally, the disposition of submerged lands is a sovereign act, not merely a proprietary act, and therefore is outside the executive's general land management authority.¹⁰

In summary, equal footing cases are not so driven by the facts as to foreclose the determination on a 12(b)(6) motion whether portions of the Tribe's complaint fail to state a claim to the disputed submerged lands. The burden of proof placed on Tribes in equal footing cases establishes a very high

¹⁰ See *United States v. Oregon*, 295 U.S. 1, 14 (1935), describing a conveyance of submerged lands as a "separation from sovereignty." In comparison, the Court in *Midwest Oil* recognized an implied delegation to the President of congressional authority to withdraw public lands in part because "the lands laws are not of a legislative character in the highest sense of the term (art. 4, § 3), 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.' " 236 U.S. at 474, quoting *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1904).

threshold of evidence which must be presented to overcome the presumption that the United States did not convey title to the Tribe. This is especially true where it is obvious on the face of the pleadings, as it is here, that the alleged instrument of conveyance was issued without authority. To the extent that the Tribe's claims are based on an executive order issued without proper authority, it was proper to dismiss the Tribe's claims, since no set of facts could be conceived that would sustain the Tribe's claims to the disputed submerged lands.

CONCLUSION

The portion of the judgment of the Ninth Circuit Court of Appeals allowing the Coeur d'Alene Tribe to obtain a decree of its alleged title to the disputed waters and submerged lands, and injunctive relief ordering state officers act in accordance with such title, should be reversed. Additionally, that portion of the judgment holding that the executive order establishing the Coeur d'Alene Indian Reservation may be sufficient to convey the disputed submerged lands to the Tribe should be vacated or reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF IDAHO, ET AL., PETITIONERS

v.

COEUR D'ALENE TRIBE OF IDAHO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

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QUESTION PRESENTED

The petition for a writ of certiorari presents two questions for this Court's review. The United States will address the second question, which is:

Whether, if the federal courts have jurisdiction over this action, the Coeur d'Alene Tribe's suit should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim on which relief can be granted.

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**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

INTEREST OF THE UNITED STATES

The Coeur d'Alene Tribe brought this action to confirm its title to submerged lands beneath Lake Coeur d'Alene and other navigable watercourses and to enjoin the State of Idaho and its officials from taking actions that are inconsistent with the Tribe's rights. As trustee on behalf of the Coeur d'Alene Tribe, the United States has filed a separate action against the State of Idaho asserting that, by virtue of congressional and executive actions, the Tribe has a beneficial interest in a portion of those submerged lands. See *United States v. Idaho*, No. CV 94-328-N-EJL (D. Idaho filed July 19, 1994); Br. in Opp. App. 22-31. The United States accordingly has a direct interest in the subject matter of the Tribe's suit.

STATEMENT

The Coeur d'Alene Tribe and certain tribal members (the Tribe) brought suit in the United States District Court for the District of Idaho against petitioners State of Idaho, certain state agencies, and certain state officials. The Tribe alleged that it has a legal interest in the submerged lands beneath Lake Coeur d'Alene and related watercourses, and it sought to quiet its title and enjoin petitioners from taking actions inconsistent with the Tribe's rights. The district court dismissed the suit, ruling that the Tribe's action to quiet title is barred by the Eleventh Amendment and that the Tribe has failed to state an actionable claim for injunctive relief against the state officials. Pet. App. 29-49. The court of appeals reversed in part, holding that the Tribe's suit against the state officials is actionable under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and that the district court's dismissal for failure to state a claim was in error. Pet. App. 1-28.

1. The Coeur d'Alene Tribe of Idaho is a federally acknowledged Indian tribe. See 60 Fed. Reg. 9250, 9251 (1995); 25 C.F.R. Pt. 83. This case involves a long-standing dispute between the Tribe and the State of Idaho over the Tribe's claim to submerged lands within the State's borders. As noted in our Statement of Interest, that dispute is also the subject of a federal suit filed by the United States on behalf of the Tribe. We therefore provide a brief summary of the history concerning the Tribe's title claims.

a. At the time of the founding of the United States, the Coeur d'Alene Tribe occupied what is now known as the Lake Coeur d'Alene region of the State of Idaho. The records of the Lewis and Clark expedition

of 1804 noted the existence of the Tribe in that area. Other nineteenth century explorers, fur traders, and missionaries identified the Coeur d'Alene Tribe as a distinct Indian community that used and resided around Lake Coeur d'Alene. See *Coeur d'Alene Tribe of Indians v. United States*, 4 Ind. Cl. Comm'n 1 (1955) and 6 Ind. Cl. Comm'n 1 (1957).

b. The United States acquired fee title to the Lake Coeur d'Alene region through the Treaty with Great Britain, 9 Stat. 869 (proclaimed Aug. 5, 1846). It initially placed those lands within the Oregon Territory, Act of Aug. 14, 1848, ch. 177, § 1, 9 Stat. 323, and later within the Washington Territory, Act of Mar. 2, 1853, ch. 90, § 1, 10 Stat. 172. The arrival of non-Indian settlers in the region led to conflicts between the United States and the Tribe, which, in 1858, culminated in the Steptoe Wars. The United States and the Tribe ended those hostilities through a brief written agreement that did not provide for the cession of any of the Tribe's aboriginal lands. See S. Exec. Doc. No. 1, 35th Cong., 2d Sess. 408-410 (1859) (Report of the Secretary of War).

c. In 1863, Congress established the Idaho Territory, which embraced most of the Coeur d'Alene Tribe's aboriginal lands. See Act of Mar. 3, 1863, ch. 117, § 1, 12 Stat. 809. Congress, however, preserved the "rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty." *Ibid.* Congress also preserved the United States' existing powers respecting those Tribes. *Id.* § 17, 12 Stat. 814.

d. Four years later, on May 23, 1867, the Commissioner of Indian Affairs informed the Secretary of the Interior that "a necessity exists for some arrangement under which the [Coeur d'Alene and

other Tribes] should have some fixed home set apart for them before the lands are all occupied by the whites, who are rapidly prospecting the country." 1 C. Kappler, *Indian Affairs: Laws and Treaties* 835 (1904). The Commissioner stated that "such arrangements can now be made by direct action of the Department." *Ibid.* See *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 381 (1868) (recognizing the practice of the President to set apart public lands for public uses).

The Secretary of the Interior transmitted that recommendation to the Commissioner of the General Land Office, who agreed that a specific reservation should be set aside for various Indian groups, including the Coeur d'Alene Tribe. The Commissioner of the General Land Office noted that "no surveys of the public lands have been made in those portions of Idaho Territory, nor is this office advised of the extinguishment of Indian titles to the same guaranteed to them by the [Act of Mar. 3, 1863]." 1 C. Kappler, *supra*, at 836. But he nevertheless stated that "[t]he records of this office show[] no objection to the policy recommended to the Department by the Commissioner of Indian Affairs." *Ibid.*

The Secretary of the Interior recommended to President Andrew Johnson that he set aside a reservation for the Coeur d'Alene Tribe in accordance with the Indian Commissioner's recommendation. 1 C. Kappler, *supra*, at 837. The President set aside those lands as recommended by the Secretary. *Ibid.* That reservation, however, included only a small portion of Lake Coeur d'Alene, and the Tribe refused to accept it. In 1873, the Department of the Interior dispatched three commissioners to negotiate a relinquishment of the Tribe's aboriginal title and to

establish an acceptable reservation for the Tribe. *Coeur d'Alene Tribe*, 4 Ind. Cl. Comm'n at 6.

e. On July 28, 1873, the United States and the Coeur d'Alene Tribe entered into a written agreement in which the Tribe "agreed to relinquish to the Government all right and title in and to all lands theretofore claimed by said tribe, lying outside of the proposed reservation," which was described therein. See *Coeur d'Alene Tribe*, 4 Ind. Cl. Comm'n at 6. The agreement provided that it would not be binding unless approved by Congress, but Congress failed to take action on it. *Ibid.* On November 8, 1873, President Grant issued an Executive Order establishing a reservation for the Coeur d'Alene Tribe. 1 C. Kappler, *supra*, at 837. Although the description of the reservation varied in some respects from the description contained in the July 28, 1873, agreement (see 4 Ind. Cl. Comm'n at 6), both descriptions embraced all of Lake Coeur d'Alene. See Br. in Opp. App. 32 (map).

f. In 1886, Congress provided for the Secretary of the Interior "to negotiate with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene reservation to the United States," additionally stating that "no agreement made shall take effect until ratified by Congress." Act of May 15, 1886, ch. 333, § 1, 24 Stat. 44; see *Coeur d'Alene Tribe*, 4 Ind. Cl. Comm'n at 6-7. Pursuant to that Act, commissioners appointed by the United States and the Coeur d'Alene Tribe entered into an agreement on March 26, 1887, in which the Tribe agreed to accept \$150,000 in return for its cession of all of its aboriginal lands "with the exception of the * * * Coeur d'Alene Reservation." See 1 C. Kappler, *supra*, at 419-422. Congress later ratified

that agreement. See Act of Mar. 3, 1891, ch. 543, § 19, 26 Stat. 1026-1029.

g. The discovery of valuable minerals in the Lake Coeur d'Alene region created additional demands for non-Indian use of the lands and waters within the Coeur d'Alene Reservation. On January 23, 1888, the Senate passed a resolution directing the Secretary to report on "the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers." S. Misc. Doc. No. 36, 50th Cong., 1st. Sess. 1 (1888). The Secretary responded that the Coeur d'Alene Reservation included Lake Coeur d'Alene and a portion of the Coeur d'Alene and St. Joseph Rivers. S. Exec. Doc. No. 76, 50th Cong., 1st. Sess. 1-2 (1888).

h. That same year, Congress enacted a statute provisionally granting the Idaho and Washington Railroad Company a right of way "for the extension of its railroad through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation." Act of May 30, 1888, ch. 336, § 1, 25 Stat. 160. The Act provided that the center line of the right of way shall be located "along the east side of the Coeur d'Alene Lake" and extend 75 feet in either direction from the center line. *Id.* §§ 1, 2, 25 Stat. 160-161. The Act stated that "the consent of the Indians to said right of way shall be obtained by said railroad company in such manner as the Secretary of the Interior shall prescribe, before any right under this act shall accrue to said company." *Id.* § 3, 25 Stat. 161. The Act also provided for

"compensation to be paid the Indians for such right of way" (*ibid.*) and directed that the railroad shall not "assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land" (*id.* § 5, 25 Stat. 161).

i. On March 2, 1889, Congress directed the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." Act of Mar. 2, 1889, ch. 412, § 4, 25 Stat. 1002. The ensuing negotiations resulted in an agreement of September 8, 1889, in which the Tribe agreed to a diminishment of its reservation in return for a cash payment of \$500,000. See 1 C. Kappler, *supra*, at 422-423. Under that agreement, the northern boundary of the diminished reservation crossed Lake Coeur d'Alene, leaving the lower one-third of the lake within the boundary of the reservation. Congress later ratified that agreement. See Act of Mar. 3, 1891, ch. 543, § 20, 26 Stat. 1029-1030.

j. Congress admitted Idaho to the Union on July 3, 1890. Act of July 3, 1890, ch. 656, 26 Stat. 215. The Act providing for Idaho's admission to the Union "accepted, ratified, and confirmed" the Constitution that had been approved by the people of the Idaho Territory. § 1, 26 Stat. 215. At the time of adoption, the Idaho Constitution provided:

[T]he people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian

tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Idaho Const. of 1889, art. XXI, § 19.

k. In 1893, Congress directed the Secretary of the Interior "to negotiate with the Coeur d'Alene Indians for a change of the northern line of their reservation, so as to exclude therefrom a strip of land on which the town of Harrison and numerous settlers are located." Act of Mar. 3, 1893, ch. 209, § 1, 27 Stat. 616. The negotiations resulted in an agreement of February 7, 1894, 1 C. Kappler, *supra*, at 531, which Congress ratified in the Act of August 15, 1894, ch. 290, § 14, 28 Stat. 322. The Tribe received \$15,000 for the strip of land. Under that agreement, a western north-south boundary line and a northern east-west boundary line of the Coeur d'Alene Reservation cross the bed of Lake Coeur d'Alene. *Ibid.*

l. In 1906, Congress enacted legislation providing for the allotment of the Coeur d'Alene Reservation. Allotment Act of 1906, ch. 3504, 34 Stat. 335. As a result of the allotment process, the land held in trust for the Tribe within the Reservation was reduced from 335,000 acres to 58,000 acres. Before allotment, Congress withdrew from the Coeur d'Alene Reservation approximately 7,800 acres of upland and submerged land for sale to the State of Idaho, which purchased those lands for the creation of Heybrun State Park. Congress specified that the proceeds from the sale would be deposited in the United States

Treasury for the use and benefit of the Coeur d'Alene Tribe. Act of Apr. 30, 1908, ch. 153, 35 Stat. 78-79.

m. In 1946, Congress created the Indian Claims Commission. Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049. See generally *United States v. Dann*, 470 U.S. 39 (1985). The Coeur d'Alene Tribe brought a Claims Commission action against the United States, seeking compensation for loss of aboriginal lands and for alleged breaches of fair and honorable dealings with the Tribe. The Indian Claims Commission found that the Tribe had aboriginal title to lands comprising the Lake Coeur d'Alene region, *Coeur d'Alene Tribe*, 4 Ind. Cl. Comm'n at 11-12, and that the United States' past payment for those lands was insufficient to satisfy its obligation of fair and honorable dealings, 6 Ind. Cl. Comm'n at 36-37. The Commission awarded the Tribe \$4,427,778.03, less allowable offsets, for lands outside of the 1873 boundaries of the Reservation. *Id.* at 67.

2. On October 15, 1991, the Tribe filed a complaint against petitioners respecting the use and ownership of submerged lands within the 1873 boundaries of the Coeur d'Alene Reservation. The Tribe asserted that it retained unextinguished aboriginal title to the submerged lands and that it was entitled to exclusive use and occupancy of those lands by virtue of the United States' creation of the Coeur d'Alene Reservation. It asked the district court to issue an order establishing the Tribe's title and enjoining petitioners from interfering with its property interests. Pet. App. 3, 30-31; Br. in Opp. App. 3-14 (complaint). Petitioners did not answer the complaint, but instead filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Pet. App. 3, 31. Petitioners contended that the Eleventh Amendment

barred the Tribe's suit and that the Tribe had failed to state a claim upon which relief could be granted. See Br. in Opp. 15-17 (motion); J.A. 2-28.

The district court granted petitioners' motion to dismiss. Pet. App. 29-49. It concluded that the Tribe's claims against the State of Idaho and the state agencies are barred by the Eleventh Amendment because those claims seek federal judicial relief against the State. *Id.* at 32-37. The court also concluded that the Tribe's claims against state officials for quiet title and declaratory relief are barred by the Eleventh Amendment because those claims are functionally equivalent to a damage action against the State. *Id.* at 37-40. The court determined that it "could enjoin the [state officials] if it were to find that the State is not the rightful owner of the disputed lands and waters." *Id.* at 40. The court ruled, however, that the Tribe's claims of ownership are "without foundation" in light of the Equal Footing Doctrine. *Id.* at 40-41. It accordingly held that the Tribe is not entitled to injunctive relief against the state officials. *Id.* at 40-47. See also *id.* at 3.

3. The court of appeals affirmed in part, reversed in part, and remanded the case for further proceedings. Pet. App. 1-28. The court of appeals agreed with the district court "that the Eleventh Amendment bars all claims against the State and the Agencies, as well as the quiet title claim against the Officials." *Id.* at 4. It accordingly affirmed the district court's dismissal of those claims. *Ibid*; see *id.* at 4-10, 21-22. Like the district court, the court of appeals concluded that the Eleventh Amendment does not bar the Tribe's claims against state officials for injunctive and declaratory relief that "seek only to

preclude future violations of federal law." *Id.* at 4, 10-23.

The court of appeals rejected, however, the district court's ruling that the Tribe had failed to state a valid claim for injunctive relief against the state officials. Pet. App. 4. The court of appeals recognized that the Equal Footing Doctrine creates a "strong presumption" against finding that the United States has conveyed submerged lands to the Tribe. *Id.* at 24 (citing *Montana v. United States*, 450 U.S. 544, 551-552 (1981)). But the court of appeals noted that the Tribe was entitled to an opportunity to develop facts rebutting that presumption. Pet. App. 24-25. It also rejected petitioners' argument, made for the first time on appeal, that the President categorically lacked authority to create interests in submerged lands without express congressional authorization. *Id.* at 25-27. The court concluded that "it is conceivable that the Tribe could prove facts that would entitle it to the relief sought" and that accordingly "dismissal for failure to state a claim was error." *Id.* at 27.

4. While the Tribe's case was under submission before the court of appeals, the United States filed a separate action against the State of Idaho respecting the Tribe's title to submerged lands. See Br. in Opp. App. 22-31. The Tribe has intervened in that action, which is currently in discovery and is scheduled for trial beginning on December 1, 1997.

SUMMARY OF ARGUMENT

A. The petition for a writ of certiorari presents two questions for this Court's review. The first question is whether the Coeur d'Alene Tribe may seek injunctive relief against state officers,

notwithstanding the Eleventh Amendment's recognition of state sovereign immunity, on the ground that the officers are exercising authority over tribal property under an erroneous claim of state ownership. The United States takes no position on that question. This Court has already addressed the sovereign immunity of the United States respecting real property disputes in *Block v. North Dakota*, 461 U.S. 273 (1983). The Court held that Congress intended the Quiet Title Act, 28 U.S.C. 2409a, to provide the exclusive means by which adverse claimants can challenge the United States' title to real property and that Congress accordingly has forbidden the use of officer suits against federal officials for that purpose.

B. If the Court concludes that the Eleventh Amendment bars an officer suit against state officials in the circumstances presented here, then the case must be dismissed without reaching the second question presented by the petition. But if the Court determines that the Tribe can sue the state officials, then the question arises whether the court of appeals properly reversed the district court's order dismissing the complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. If the Court resolves that question, we submit that the Court should affirm the court of appeals' ruling.

As this Court has repeatedly stated, a complaint should not be dismissed under Rule 12(b)(6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The district court

erred in dismissing the Tribe's claims because, as the court of appeals pointed out, "it is conceivable that the Tribe could prove facts that would entitle it to the relief sought." Pet. App. 27. Although there is a "strong presumption" that title to lands beneath inland navigable waters passes to the new State upon its admission to the Union, that presumption is rebuttable. *Montana v. United States*, 450 U.S. 544, 551-552 (1981). The Tribe is entitled to an opportunity to overcome the presumption based on the circumstances surrounding the creation and continuation of the Coeur d'Alene Reservation.

It would be particularly premature to dismiss the Tribe's complaint in this case, because the United States and Idaho are currently preparing for trial on the very question of the Tribe's title to submerged lands. If this Court concludes that the federal courts have jurisdiction over the Tribe's suit, that suit could be consolidated on remand with the United States' action, and the respective claims of Idaho, the United States, and the Tribe could be resolved in a single proceeding.

ARGUMENT

THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIBE'S SUIT SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

A. The principal issue in this case is whether the Eleventh Amendment, which preserves the sovereign immunity of States from suit in federal courts, bars a private suit in which the plaintiff seeks to enjoin a state official from exercising authority over real property under a claim of state ownership. The United States takes no position on that issue, because

the Court's resolution of the question in this case is unlikely to affect the United States' sovereign interests.

The United States, like individual States of the Union, possesses sovereign immunity from private suit. Accordingly, "the United States may not be sued without its consent and * * * the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). In 1974, Congress enacted the Quiet Title Act (QTA), 28 U.S.C. 2409a, which provides a limited waiver of the United States' immunity from suit with respect to real property disputes. This Court concluded in *Block v. North Dakota*, 461 U.S. 273 (1983), that the QTA is "the exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Id.* at 286.

The Court's decision in *Block* specifically rejected North Dakota's argument that a plaintiff who is unable to meet the QTA's conditions for suit against the United States can avoid those conditions by suing a federal officer on the theory that the officer is improperly exercising authority over the property based on an erroneous claim of ownership by the United States. In that case, North Dakota attempted to use "the device of an officer's suit" to "avoid the QTA's statute of limitations and other restrictions." 461 U.S. at 284. The Court foreclosed suit against the federal government on that basis, stating:

If North Dakota's position were correct, all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted. "It would require the suspension of disbelief to ascribe to Congress the

design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Brown v. GSA*, 425 U.S. 820, 833 (1976).

Id. at 284-285.

In our view, the Court's decision in *Block* indicates quite clearly that a plaintiff may not bring suit to enjoin a federal official's actions respecting real property on the theory that the official's exercise of authority is predicated on a non-meritorious claim of federal ownership. Because the Court's construction of the QTA resolves the question of federal officer suits respecting real property, the United States does not have a substantial interest in the question of state immunity presented here.

B. If this Court determines that the Eleventh Amendment bars the Tribe's claims, then the case must be dismissed without reaching the second question presented by the petition. But if the Court determines that the Tribe may sue the state officials concerning rights in submerged lands, then the question arises whether the court of appeals properly reversed the district court's order dismissing the complaint for failure to state a claim upon which relief can be granted.

The court of appeals' ruling was, of course, interlocutory, and both courts below addressed the equal footing issue without any discussion of most of the Acts of Congress and agreements noted above, see pages 2-9, *supra*, much less the factual contexts in which they arose. See Pet. App. 24-27, 40-47. For those reasons, and because there is no circuit conflict on the granting of a Rule 12(b)(6) motion on a title claim in circumstances such as those presented here, the Court might decline to address that issue

at this time. If the Court chooses to reach the issue, however, we submit that the Court should affirm the court of appeals' ruling. The district court erred in dismissing the Tribe's claims because, as the court of appeals pointed out, "it is conceivable that the Tribe could prove facts that would entitle it to the relief sought." Pet. App. 27. Indeed, the United States and Idaho are currently preparing for trial on the very question of the Tribe's title to a portion of the submerged lands that the Tribe claims in this suit.

1. As this Court has repeatedly stated, a complaint should not be dismissed under Rule 12(b)(6) for failure to state a claim on which relief can be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court of appeals correctly concluded that petitioners' Rule 12(b)(6) motion must therefore be denied.

The Tribe's complaint alleges that the United States engaged in a course of dealing with the Tribe whereby the federal government failed to extinguish the Tribe's aboriginal title to the submerged lands within the 1873 boundaries of the Coeur d'Alene Reservation and actually conveyed those lands to, or reserved them for the benefit of, the Tribe before Idaho's admission to the Union. As a general principle, the United States holds lands beneath navigable waters in trust for future States. See *Utah Division of State Lands v. United States*, 482 U.S. 193, 200-202 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981). But the United States may dispose of such

land prior to statehood to carry out public purposes, including the creation of an Indian reservation. *Id.* at 551, 556. See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 86-87 (1918). There is a "strong presumption" that the United States did not convey submerged lands. *Montana*, 450 U.S. at 552. That presumption, however, is rebuttable. See, e.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) (holding that the United States conveyed a portion of the bed of the Arkansas River to the Choctaw and Cherokee Indian Nations).

As the court of appeals correctly recognized (Pet. App. 24-25), the Tribe may overcome that presumption through proof of a contrary intent. That proof may take the form of evidence respecting the parties' understanding of the various Acts of Congress, agreements and Executive Orders, including evidence of the circumstances leading to the formation of the relevant documents and the subsequent conduct of the parties. See *Choctaw Nation*, 397 U.S. at 628-636. For example, in *Montana*, this Court denied the Crow Tribe's claim to the bed of the Big Horn River only after considering the language of the Treaty of Fort Laramie in its historical context. 450 U.S. at 553-556. The Court specifically distinguished *Choctaw Nation* based on "the unusual history of the treaties there at issue." *Id.* at 555 n.5. Similarly, it distinguished *Alaska Pacific Fisheries* on the basis of the Crow Tribe's history of non-use of the watercourse. *Id.* at 556 ("the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life").

The Court's decisions in *Montana*, *Choctaw Nation*, and *Alaska Pacific Fisheries* demonstrate that a Tribe may put forward evidence of special

circumstances to prove its ownership of submerged lands. In this case, the Coeur d'Alene Tribe can point to a number of considerations that distinguish its claim of title from that in *Montana*. For example, the 1873 Executive Order that defined the original extent of the Coeur d'Alene Reservation made specific reference to submerged lands by setting the boundary at "the center of the channel of [the] Spokane River." 1 C. Kappler, *Indian Affairs: Laws and Treaties* 837 (1904); compare Br. in Opp. App. 8 (complaint) with *Choctaw Nation*, 397 U.S. at 631 & n.8. In addition, Congress later approved tribal cessions that explicitly drew boundary lines within the lake bed. See pages 7-8, *supra*. Furthermore, the Coeur d'Alene Tribe, unlike the Crow Tribe, has a long history of using the waters and submerged lands for fishing and other tribal and ceremonial purposes. Compare *Alaska Pacific Fisheries*, 248 U.S. at 86. In light of the distinguishing characteristics of the Coeur d'Alene Tribe's claims, the district court clearly erred in summarily dismissing the Tribe's suit. It is, at the very least, not "beyond doubt" that the Tribe can prove no set of facts that would entitle it to relief. See, e.g., *Conley*, 355 U.S. at 45-46; see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[O]n a motion to dismiss, we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'").

Recognizing the inadequacy of the district court's analysis, petitioners attempt to defend the district court's decision on a rationale that was neither put before nor cited by the district court. See Pet. App. 37-47; J.A. 1-44. They assert that "the President may not convey submerged lands to Indian tribes without express congressional authorization." Pet. Br. 39.

The correctness of petitioners' assertion, however, is not self-evident, at least insofar as petitioners contend that the President is without authority to reserve submerged land for the benefit of an Indian Tribe in a manner that would prevent title to the submerged land from passing to the State at statehood. The Court has rejected similar challenges by other States to the validity of the President's Executive Orders setting aside land and water for Indian reservations. See *Arizona v. California*, 373 U.S. 546, 598 (1963). As the court of appeals noted, petitioners cite no authority holding that the President cannot also set aside submerged lands through an Executive Order. See Pet. App. 26-27. Compare *United States v. Alaska*, 423 F.2d 764 (9th Cir.) (rejecting State's claim of title to lake bed within wildlife reservation created by Executive Order), cert. denied, 400 U.S. 967 (1970).

As petitioners acknowledge through their reference to "explicit" authorization, Congress may authorize the conveyance or reservation of lands through ratification or recognition of the President's actions. Indeed, as petitioners concede, this Court has previously held that Congress, through acquiescence, implicitly delegated to the President the authority to withdraw portions of the public domain from settlement. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). In this case, the Coeur d'Alene Tribe has a substantial argument that Congress did not merely acquiesce in the President's actions respecting the Coeur d'Alene Reservation, but also specifically recognized and ratified the President's actions with respect to the submerged lands therein through the series of statutes discussed above. Those statutes include the pre-statehood Act of Congress calling for

negotiations with the Tribe for cession of a portion of its Reservation, and the Statehood Act, which ratified the Idaho Constitution's disclaimer of any right to all lands "owned or held" by Indian Tribes. See pages 5-8, *supra*; compare, *e.g.*, *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1873). The question whether and to what extent those statutes confirmed the status of the Reservation and submerged lands can be definitively answered only through a full factual inquiry into the history of the federal actions respecting the Reservation.

Petitioners fault the court of appeals for "not critically examining the nature of the federal act creating the original Coeur d'Alene Reservation." Pet. Br. 44. But as the court of appeals recognized (Pet. App. 27), it cannot conduct such an examination in a factual vacuum. Indeed, petitioners' citation of *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), illustrates the reason why that is so. Petitioners cite that case as demonstrating that the President cannot convey property through an Executive Order. They draw that conclusion from the Court's holding that the Sioux Tribe was not entitled to compensation for the diminishment of an Executive Order reservation. But the Court reached that conclusion based on the record before it, citing as "striking proof" the "very absence of compensatory payments in such situations." *Id.* at 330. This case, by contrast, presents a quite different factual situation, in which Congress refused to diminish the Coeur d'Alene Reservation in the absence of compensatory payments. For example, when a railroad sought a right of way through the Coeur d'Alene Reservation (apparently including a portion of the lake bed), Congress expressly conditioned the grant of the right of way upon

the consent of the Tribe and payment of compensation. Act of May 30, 1888, ch. 336, § 3, 25 Stat. 161. Thus, it is far from clear that *Sioux Tribe* has a significant bearing on the case presented here. It therefore provides no basis for dismissal at a preliminary juncture of the litigation.

2. Petitioners' argument that the Court should reinstate the district court's dismissal under Rule 12(b)(6) is particularly inappropriate in the context of this case. As petitioners are well aware, the United States, as trustee for the Tribe, has filed a separate action asserting that the Tribe has a beneficial interest in a portion of the submerged lands at issue in this case. See Br. in Opp. App. 22-31. The United States claims only a portion of the bed of Lake Coeur d'Alene on behalf of the Tribe, but the relevant facts and substantive legal issues in that suit significantly overlap with those that would be presented in this case. The State of Idaho and the United States are currently engaged in the preparation of expert testimony reports, which are due to be exchanged between the parties in the coming months. Discovery will close on February 14, 1997, and the case is scheduled to go to trial on December 1, 1997. See *United States v. Idaho*, No. CV 94-328-N-EJL, Scheduling Conf. Order at 2, 4-5 (D. Idaho Mar. 12, 1996).

Petitioners, who make no mention of that pending litigation, would have this Court dismiss the Tribe's claims on the merits without regard to the fact that the State of Idaho is currently litigating in another forum the question of title to submerged lands on the Reservation. Petitioners' suggested course of action would improvidently interfere with ongoing litigation that would provide exactly the sort of factual development that the court of appeals has determined is

needed for decision in this case. Accordingly, if the Court concludes that the district court in this case has jurisdiction to decide the Tribe's claims, and then reaches the question of the dismissal of the Tribe's complaint on the merits, it should affirm the court of appeals' reversal of the district court's order of dismissal. The result of that disposition would simply be to return this case to the district court for further proceedings. This suit could then be consolidated with the United States' pending action, and the respective claims of Idaho, the United States, and the Tribe could then be resolved in a single proceeding.

CONCLUSION

If the Court reaches the second question presented, it should affirm the judgment of the court of appeals.

Respectfully submitted.

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JULY 1996

MAY 29 1996

CLERK

In The
Supreme Court of the United States
October Term, 1995

STATE OF IDAHO; PHIL BATT, Governor; PETE CENAR-RUSA, Secretary of State; ALAN G. LANCE, Attorney General; J.D. WILLIAMS, Controller; ANNE FOX, Superintendent of Public Instruction; KEITH HIGGINSON, Director, Dept. of Water Resources; each individually and in his official capacity; IDAHO STATE BOARD OF LAND COMMISSIONERS; and IDAHO STATE DEPARTMENT OF WATER RESOURCES,

v.

Petitioners,

COEUR D'ALENE TRIBE, in its own right and as the beneficially interested party subject to the trusteeship of the United States of America; ERNEST L. STENSGER, LAWRENCE ARIPIA, MARGARET JOSE, DOMNICK CURLEY, AL GARRICK, NORMA PEONE and HENRY SIJOHN, individually, in their official capacity and on behalf of all enrolled members of Coeur D'Alene Tribe,

Respondents.

On Writ Of Certiorari To The United States Court
Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA,
ALASKA, ARIZONA, ARKANSAS, COLORADO,
CONNECTICUT, FLORIDA, HAWAII, IOWA, MICHIGAN,
MINNESOTA, MISSOURI, MONTANA, NEBRASKA,
NEVADA, NEW YORK, OHIO, OKLAHOMA, SOUTH
DAKOTA, UTAH, WASHINGTON AND WISCONSIN
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Do Eleventh Amendment principles enunciated in *Seminole Tribe v. State of Florida*, ___ U.S. ___, 116 S. Ct. 1114 (1996), preclude application of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to permit a federal court to grant judicial relief amounting to quiet title to a state's navigable waters?

2. May an executive order be construed to defeat the claims of a future state to its navigable waters in the absence of specific intent or statutory authority?

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INTEREST OF AMICI

Although many of the states represented in this brief have navigable waters running adjacent to or through Indian reservations, the potential scope of this case goes far beyond disputes between tribes and states. If all that is necessary to sue states in federal courts is the use of an officers' suit, coupled with declaratory relief, and the allegation that federal law is being violated, little will remain of the Eleventh Amendment's purpose of preventing states from suffering "the indignity of . . . the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), quoted in *Seminole Tribe v. State of Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1124 (1996). This is particularly egregious where the issue is quiet title to the navigable waters of a state – held under the equal footing doctrine as an incident of sovereignty.¹

Since the initial boundary between a state's navigable waters and private upland is determined by federal legal principles, *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), virtually any waterfront land owner might attempt under the decision below to utilize an injunctive action in the federal courts to litigate what is essentially a local real property dispute. This would burden federal courts with disputes that properly belong in state court.

¹ Of course, the equal footing doctrine does not apply to the original states, such as *amicus* Connecticut. Basic principles governing sovereign ownership of the beds of navigable waterways, however, do apply equally to all 50 states, as do *amicus's* concerns about the proper scope of the Eleventh Amendment. See, e.g., discussion at p. 17, *infra*.

The ability of state courts to entertain such controversies is not in question. Indeed, not until 1875 did the federal courts exercise full federal question jurisdiction. 13 Charles A. Wright, et al., *Federal Practice and Procedure: Jurisdiction*, 2d § 3503, pp. 9-10 (1984). Since 1875, the caseload of federal courts has increased precipitously. "The reality is that today there is a mad rush to the federal courts." *Id.* at § 3510, pp. 43-44. There is no reason to add to that burden by encouraging the filing of quiet title actions in the guise of officers' suits.

The second issue in this case – the question of the executive's authority to reserve states' sovereign lands and waters – will not only arise in other public land cases, but in a broader context as well. As we observed in our brief supporting Idaho's petition for certiorari, the Department of the Interior recognizes 306 tribes in the lower 48 states and another 197 in Alaska. Approximately fifty-two million acres of trust land are held by tribes and individual Indians. Wilkinson, *American Indians, Time and the Law* 8 (1987). "Additionally, western states contain millions of acres of federal lands withdrawn before statehood by executive order." If any order of the executive branch, however vague and unsupported by express congressional intent, can suffice to defeat a state's equal footing rights, the federal courts will be inundated with new claims, inspired by the decision below.

SUMMARY OF ARGUMENT

This case involves first and foremost the doctrine of sovereign immunity as enunciated in *Hans v. Louisiana*, 134 U.S. 1 (1890) – a rule described by this Court as one

which "[f]ound its roots not solely in the common law of England, but in the much more fundamental 'jurisprudence in all civilized nations'." *Seminole Tribe*, 116 S. Ct. at 1130, quoting *Hans v. Louisiana*, 134 U.S. at 17, in turn quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858). State sovereign immunity presupposes that under our constitutional structure, "[t]he states entered the federal system with their sovereignty intact; the judicial authority in Article III is limited by this sovereignty." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); see *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98-99 (1984).

In light of these rules, the abuse of the officers' suit where a plain and speedy state remedy exists should not be permitted.

The principles that are applicable here have all been set forth in *Seminole Tribe* and earlier decisions:

1. The strictures of sovereign immunity cannot be avoided by suing government officials to obtain relief which in fact is only available through a suit against the government itself. Cf. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682 (1982); *Block v. North Dakota*, 461 U.S. 281 (1983).
2. Where a detailed statutory remedy exists, as for quiet title, an officers' suit may not be substituted for that remedy. *Seminole Tribe*, 116 S. Ct. at 1132; *Block*, 461 U.S. at 273.
3. The federal government is one of enumerated powers. Accordingly, the authority of the executive branch must come from constitutional or statutory bases. The President has no independent authority to set aside reservations if the effect is to defeat a future state's rights under the Equal Footing doctrine; nor

may such a reservation be made without an "intention . . . definitely declared." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

4. Conveyances of navigable waters, held in trust for future states, may not be inferred in the absence of express intent on the part of Congress. *Montana v. United States*, 450 U.S. 544, 552 (1981).

Above all, construction of the constitutional demarcation between the residual sovereignty of states and the federal judicial power must rest on what Justice Black described as "our Federalism":

"[A] system in which there is sensitivity to the legitimate interests of both state and national governments, and in which the national government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

STATEMENT OF CASE

The Coeur D'Alene Tribe seeks to establish title to all the navigable waters, including Lake Coeur D'Alene, within the Tribe's reservation. In order to do this, it must defeat the claims of the State of Idaho, which, absent a valid pre-statehood reservation, acquired title to those waters upon statehood under the Equal Footing doctrine. Idaho's quiet title laws provide a clear and adequate remedy for that determination. Rather than resorting to a quiet title action in state court, however, the Tribe brought an officers' suit against various state officials

seeking to restrain them from asserting any interest in the waters. The Tribe bases its claim on an executive order, unsupported by statute and imprecise in its terms, that allegedly included the lake within the reservation prior to Idaho's statehood.

The Ninth Circuit upheld the Tribe's claim to federal jurisdiction under the *Ex parte Young* doctrine, 209 U.S. 123 (1908), and then reversing the district court's dismissal of the action. Idaho's petition for certiorari followed.

The determination to enjoin state officers from asserting title claims was, by the appellate court's own admission, singularly unsatisfying, since it left unresolved the State's claim to the lake. Even more significantly, however, the court's decision violated principles of federalism only this year reiterated and affirmed by this Court.

ARGUMENT

I

INTRODUCTION

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states. . . ." *The Federalist*, No. 81, at 511-12 (A. Hamilton) (B. Wright ed. 1961).

In this case, the Court is called upon once more to police the "state-federal frontier" formed by Tenth and Eleventh Amendment doctrines. See Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61, 86 (1989); 13 Charles A. Wright, et al., *Federal Practice and Procedure: Jurisdiction*, 2d § 3502, pp. 4-5 (1984). In deciding whether the Eleventh Amendment permits trial of Idaho's title to its navigable lakes, acquired as an incident of sovereignty on admission to the union, *United States v. Oregon*, 295 U.S. 1, 14 (1935), the Court should affirm its commitment to the basic principles of federalism set forth in *Seminole Tribe*. If, as the court below holds, a state's constitutional equal footing rights to its navigable waters may be effectively determined by suing a handful of state officers in federal court, the state sovereignty recognized in the Tenth and Eleventh Amendments to the Constitution will be a nullity. Reason, historic precedent and this Court's recent decisions refute the lower court's holding that the Eleventh Amendment may be avoided by a trick of pleading.

Although this case does not directly involve the issues dealt with in *Seminole Tribe*, that decision illumines the applicable law and lights the way to a proper result. This case, unlike *Seminole Tribe*, does not require the Court to ascertain whether Congress intended to abrogate state sovereign immunity, or whether it had power to do so. Immunity is there, and no federal statute purports to remove it. *Coeur D'Alene Tribe v. State of Idaho*, 42 F.3d 1244, 1255 (9th Cir. 1994). This case merely calls for application of well-established principles of federalism, inherent in our system and enunciated in the Tenth and Eleventh Amendments.

II

AN OFFICERS' SUIT CANNOT BE USED AS A SUBTERFUGE TO CIRCUMVENT THE ELEVENTH AMENDMENT AND STATE SOVEREIGN IMMUNITY

A. The *Ex parte Young* Doctrine Is Limited In its Scope And Application.

In *Seminole Tribe*, this Court solved a riddle that has long perplexed legal scholars: how to resolve the tension between the states' sovereign immunity encapsulated in the Eleventh Amendment and the judicial power over all federal questions set forth in Article III. See Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61 (1989); Jackson, *The Supreme Court, the Eleventh Amendment*; and Jackson, *State Sovereign Immunity*, 98 Yale L.J. 1, 125 (1988). It did so by finding inherent limitations in the power of Congress to abrogate the states' immunity. *Seminole Tribe*, 116 S. Ct. at 1131-32.

This Court has characterized state sovereign immunity as an "implicit limitation" on the judicial power of the United States. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 496 (1987), (Scalia, J., concurring in part and concurring in judgment), resting on the "inherent nature of sovereignty;" *Great Northern Life Ins. Co. v. Reed*, 322 U.S. 47, 51 (1944). Under these principles, it has been clear since *Hans v. Louisiana*, 134 U.S. 1 (1890), that a state may not be sued in federal court by citizens of another state, its own citizens, or a foreign government. *Monaco v. Mississippi*, 292 U.S. 313 (1934).

However, an exception to the general rule has been often recognized in the form of the officers' suit, based on the fiction that if a state official violates the law, he is

stripped of his official or representative character and may be made personally liable for the consequences of his official conduct. *Ex parte Young*, 209 U.S. 123 (1908).

The *Ex parte Young* doctrine has been applied to require state officers to implement a federally-mandated remedial education program [*Milliken v. Bradley*, 433 U.S. 267 (1977)] to notify federal beneficiaries of their rights under a welfare scheme [*Quern v. Jordan*, 440 U.S. 332 (1979)] and to perform a variety of acts found to constitute federally-imposed legal duties. However, *Ex parte Young* is not a universal panacea. It cannot be involved merely by naming an officer instead of the sovereign, because "the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign." *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 687 (1949). And it may be inapplicable under a variety of circumstances in light of principles of federalism and comity:

1. It does not apply where the remedy sought will result in depletion of the state treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974);
2. It does not apply to mere tortious acts by state officers acting within their authority. *Larson*, 337 U.S. at 682. In this case, the Tribe conjectures that the state officers named all may perform undefined acts inconsistent with its asserted dominion over the State's navigable waters. However, *Larson* holds that such acts may constitute "[a]t most a tortious deprivation of property." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 693. There is no showing here that the state officers named are not acting within the authority of state law, or

that the law is unconstitutional. Cf. *In re New York*, 256 U.S. 490 (1921).

3. The requirement of final state action may prevent its application. While the Supremacy Clause obligates the states to enforce the Constitution and valid federal law, recognition of state sovereignty obligates the federal courts to give the state's judicial and administrative system the first opportunity to fulfill its role. *Williamson County Regional Planning Com'n v. Hamilton Bank*, 473 U.S. 172, 192-93 (1985) (no showing of final state administrative action); see also *Prentis v. Atlantic Coast Lumber Co.*, 211 U.S. 210, 230 (1908) (no injunction against state rate-fixing body for confiscatory rates until final action).
4. It is inapplicable where injunctive relief is being sought under state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).
5. The abstention doctrine may prevent federal court adjudications in the interests of comity and federalism. *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* decision recognized the importance of what Justice Black described as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44.

Although initially applied to criminal proceedings, the *Younger* doctrine has since been utilized in civil cases as well.

See *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (abatement of nuisance); *Juidice v. Vail*, 430 U.S. 327 (1977) (contempt proceeding); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (state judgment lien, appeal bond). It has been recognized as based on a "federalism-based notion of comity," Tribe, *American Constitutional Law* at 203-04, n. 9 (1988), grounded on "the principle that state courts have the solemn responsibility, equally with the federal courts, 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States.'" *Steffel v. Thompson*, 415 U.S. 452, 460-461 (1974), quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884); see generally Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. at 79 (1989).

Other forms of abstention similarly are based on principles of federalism and comity, e.g., *Buford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (avoidance of needless conflict with state regulatory schemes); *Railway Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941) (need to permit resolution of unsettled state law). As one writer has stated, "While the Supremacy Clause obligates the states to enforce the Constitution, residual state sovereignty principles should, and often do, operate to give the state courts and administrative systems the first opportunity to fulfill their obligation. The role of the federal judiciary is only to act as a correction in case of state inaction or misconduct." Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. at 85.

B. Principles of Mutuality Require Respect For The States' Sovereign Immunity.

In *Blatchford v. Native Village of Noatak*, 501 U.S. at 775, this Court observed that a controlling factor in finding a

surrender of state sovereignty "inherent" in the plan of the constitutional convention is the element of mutuality. While suits by one state against another are thus permissible, suits by Indian tribes against states cannot be presumed to have been contemplated by the plan of the convention because there was no mutual surrender of tribal sovereignty to the state. *Id.* at 782.

III

AN OFFICERS' SUIT IS NOT AVAILABLE TO DETERMINE TITLE TO PROPERTY

Nowhere is there more reason for the application of state sovereign immunity than to suits involving the title and disposition of a state's real and personal property. As Justice White wrote in *Treasure Salvors*: "Because it is the State itself which purports to own the controverted (waters), and because the very nature of the suit, as defined in the complaint . . . is to determine the State's title to such property, this is not a case subject to the doctrine of *Ex parte Young*." White, J., concurring in part and dissenting in part, 458 U.S. at 702.¹ Since this case goes to possession and control of a state's navigable waters, one of its inherent attributes of sovereignty, application of *Ex parte Young* to avoid sovereign immunity is particularly inappropriate.

¹ "[T]he sensitive areas . . . where consent to suit is likely to be required are . . . the adjudication of interests in property which has come unsullied by tort into the bosom of the government." Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harvard L. Rev. 1, 29 (1963).

A. An Adequate Remedy Exists Under State Law.

This is not a case in which the Tribe has no adequate remedy. Rather, the state has asserted, without contradiction, that Idaho's quiet title law permits a suit against the state in state court. There is no showing that the Tribe would be deprived of a fair hearing on the issues of applicable law. The state court is an appropriate forum for determination of any federally derived right, and its utilization will implement principles of federalism and comity and avoid any unnecessary constitutional questions. *Testa v. Katt*, 330 U.S. 386 (1947). As the Court observed in *Huffman v. Pursue, Ltd.*, 420 U.S. at 611, Article VI of the Constitution binds the courts of every state to enforce federal law. There, the Court properly rejected the "assumption that state judges will not be faithful to their constitutional responsibilities."² The existence of that remedy, and the well-developed doctrines of abstention already applied in the interests of federalism and comity, compel the conclusion that the state court should be given an opportunity to adjudicate this quiet title suit.

B. Where A Comprehensive Remedy Already Exists, The Court Should Not Create A New One.

This Court's recent *Seminole Tribe* opinion teaches that where a complex legislative scheme exists for the resolution of an issue, the courts should not create a new

² Federal review of state court determinations of federal law is, in any event, always available. *Smith v. Reeves*, 178 U.S. 436, 441 (1900); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

one. *Seminole Tribe*, 116 S. Ct. at 1132; see also *Schweiker v. Chilicky*, 487 U.S. 412 (1988). If this is true under the federal scheme, how much more important should it be where, as here, important principles of state sovereignty and federalism are involved? Certainly, this is a case where courts as a matter of prudence should provide no additional remedies. *Seminole Tribe*, 116 S. Ct. at 1132-33.

C. An Officers' Suit May Not Be Used As A Substitute For A Quiet Title Action.

For all practical purposes, the decision below adjudicates the State of Idaho's title in its navigable waters without its consent. It engages in the "fiction" that Idaho's Eleventh Amendment immunity is "meaningfully safeguarded by not formally rejecting the State's claim . . . although (tribal) agents may seize the contested property and federal courts may adjudicate its title. Neither of these novel propositions follow from *Ex parte Young*." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. at 702-703. White, J. concurring in part and dissenting in part.⁴

⁴ Although a plurality of this Court held in *Treasure Salvors* that a federal court exercising rem admiralty jurisdiction could seize property held by state officials under a claim of state title, the deciding vote was cast by Justice Brennan on the basis that Eleventh Amendment immunity did not extend, in any event, to citizens suing their own state. The case was admittedly full of "procedural complexities and factual glamour." *Id.* 458 U.S. at 683, 717. Justice White described it as an "aberration," *Id.* at 717, a characterization since adopted by knowledgeable commentators. E.g., 13 Charles A. Wright, et al., *Federal Practice and Procedure: Jurisdiction*, 2d § 3524, p. 157 (1984 ed.).

Since sovereign immunity is the basic principle in this case, decisions of this Court dealing with the federal government's immunities are instructive. This Court held in *Block*, 461 U.S. at 282, 284-85, that an officers' suit may not be used as a substitute for a *federal* quiet title action, since it would constitute a device for circumventing Federal sovereign immunity. There is no valid reason why the same rationale should not be applied to *state* sovereign immunity as well.

In hearings on the Federal Quiet Title Act, this Court concluded it was the "predominant view" that citizens asserting title to or the right to possession of lands claimed by the United States were without judicial remedy because of the doctrine of sovereign immunity. *Block*, 461 U.S. at 282. To permit a court-created "end run" around the doctrine by officers' suits, the Court observed, would render nugatory the careful congressional scheme for adjudicating title. It could dispossess the government of the disputed land without affording the option of paying damages, thus permitting "disruptions of costly federal activities." It would also permit institution of "an unlimited number" of stale claims because no statute of limitations would be applicable. *Id.* at 285. Of course the same reasoning is applicable to efforts to circumvent *state* quiet title laws.

Similar reasoning was used in *Malone v. Bowdoin*, 369 U.S. 643 (1962). (Ejectment action against a forest service official from land occupied by him solely in his official capacity constitutes impermissible action against the United States.)

The irrationality of applying an *Ex parte Young* remedy to title disputes, recognized by this Court in the federal context in *Block*, was noted as well by the Court of Appeals below, which observed that even if the Tribe were ultimately to prevail on the merits, neither the State nor Tribe would hold unclouded title to the property. "Our conclusion undoubtedly will not satisfy any of the parties involved," the Court lamented, but it nevertheless determined that jurisdiction must not be declined "to the extent that it exists." *Coeur D'Alene Tribe of Idaho v. State of Idaho*, 42 F.3d at 1255.

IV

AN OFFICERS' SUIT WILL NOT LIE WHERE THE CLAIMED VIOLATION OF FEDERAL LAW IS CLEARLY FRIVOLOUS OR INSUBSTANTIAL

Where a claimed violation of federal law is frivolous or insubstantial, even an otherwise proper claim under the *Ex parte Young* theory must be dismissed. An action against a government official must be construed as one against the government, unless it is not within his statutory powers or their exercise is constitutionally void. *Larson*, 337 U.S. at 682, 701-702. Here, no effort has been made to rebut the historic presumption against federal conveyance of navigable waters held in trust for future states. Cf. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 222 (1845). Pre-statehood grants may be upheld only under "the most unusual circumstances," *Utah Div. of State Lands v. U.S.*, 482 U.S. 193, 197 (1987), and only "international duty or public exigency" has justified such actions. *Shively v. Bowlby*, 152 U.S. 1, 48-50 (1894). As we discuss in more detail in Part V, the Tribe has failed to make the showing requisite to defeat the presumption.

With respect to Indian reservations, the Court has stated that such conveyances are "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. at 55. Finally, such a conveyance must leave no doubt that it was intended to "embrace the land under the waters of the stream," *Montana v. U.S.*, 450 U.S. at 552. The presumption against a pre-statehood grant or reservation can only be overcome if it is shown: 1) that Congress clearly intended to include the submerged land within the reservation; and 2) Congress affirmatively intended to defeat the future state's title to the submerged land. *Utah Div. of State Lands v. U.S.*, 482 U.S. at 201-202; see Conference of Western Attorneys General, *American Indian Law Deskbook* 54-60 (1993).

In this case, the executive reservation on which the Tribe relies merely includes various of the State's navigable waters, including Lake Coeur D'Alene, within the reservation boundaries. Nothing in that action had the effect of conveying the beds, banks and waters of the state-to-be to the Tribe.

V

THE TRIBE FAILED TO STATE A CLAIM FOR THE BED AND BANKS OF NAVIGABLE WATERS.

The Court of Appeals erred as well on the question of whether the Coeur D'Alene Tribe states a claim for the bed and banks of the lake and rivers. As a matter of law, the Tribe fails to state such a claim. See *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

A. The Constitution Requires The United States To Hold The Bed And Banks Of Navigable Waters In Trust For The Future States Under The Equal Footing Doctrine.

Ownership and control of the beds of navigable waters has always been an essential part of the sovereignty of the several States. See *Martin v. Waddell*, 42 U.S. (16 Pet.) 367 (1842). This constitutional principle compels a presumption against any pre-statehood conveyance of the bed or banks of navigable water by the prior sovereign, just as there was at common law.

"The domain and property in navigable waters, and in the lands under them, being held by the King as a public trust; the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his case for the common benefit. . . . Grants of that description are therefore construed strictly – and it will not be presumed that he intended to part with any portion of the public domain, unless clear and especial words are used to denote it." *Id.* 42 U.S. at 411 (emphasis added).

In *Martin*, this Court held that the original thirteen states succeeded to the sovereignty of the Crown and took title to the beds and banks of tidally influenced and navigable waters. After *Martin*, this Court ruled that subsequently admitted states also received title to the beds and banks of navigable waters as well, because each state entered the union on an equal footing with the original thirteen states. *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) at 222-223, 229. During the pre-statehood period, the United States held the beds and banks of navigable waters in trust for the future State. *Id.* at 228-29.

State title to navigable waters and their bedlands is not merely a matter of property; it is fundamental to the Constitutional framework:

"[U]nder *Pollard's Lessee*, the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land title is concerned. . . ." *State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374; 97 S. Ct. 582 (1977).

Thus, this Court's decisions upholding state title to beds of navigable waters preserve "the Constitutional sovereignty of the states." *Id.* at 381.

Indian reservations are not exempt from the strong presumption against pre-statehood conveyance of the bed of navigable waters. The case of *United States v. Holt State Bank*, 270 U.S. at 49, involved a tribal claim to the bed of a lake within an Indian reservation. There, this Court held that:

"The United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional circumstances when impelled to particular disposal by some international duty or public exigency. It follows this that disposal by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was

definitely declared or otherwise made very plain." *Id.* at 55 (emphasis added).

The mere inclusion of a navigable lake within a pre-statehood Indian reservation, therefore, did not convey the navigable waters or lake bed to the Indian tribe. *Id.* at 58.

As recently as 1981, this Court again confirmed that the "strong presumption against conveyance" of navigable waters and their beds applied to a pre-statehood Indian reservation:

"A court . . . must not infer such a conveyance 'unless the intention was definitely declared or otherwise made very plain,' *United States v. Holt State Bank*, . . . or was rendered 'in clear and especial words,' *Martin v. Waddell*, . . . or 'unless the claim confirmed in terms embraces the land under the waters of the stream.' *Packer v. Bird*, ___ at 672, 34 L. Ed. 819, 11 S. Ct. 210. . . ." *Montana v. United States*, 450 U.S. at 552.

Although the river in *Montana v. United States* ran directly through the Crow Indian reservation, Congress had made no definite declaration that the river bed would be conveyed to the Tribe. Nor was there any proof that Congress intended to alter or defeat the future title of the State of Montana.⁴

⁴ As the Court pointed out in *Montana*, the only case holding otherwise, *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), was an anomaly of "very peculiar circumstances" based on a series of broken promises and the ultimate promise of the United States that the lands reserved would never become part of any state. *Montana*, 450 U.S. at 555-56, n.5; see also *Utah Div. of State Lands*, 482 U.S. at 198.

B. Only Congress May Defeat A Future State's Equal Footing Title To Navigable Waters, And Then Only Under Limited Circumstances.

In 1894, this Court held that *Congress* has power to make pre-statehood conveyance of the beds of navigable waters in certain limited and exceptional circumstances. *Shively v. Bowlby*, 152 U.S. at 1. Such circumstances may include pursuit of international obligations or response to a "public exigency." *Id.* at 48-50. This Court, however, has uniformly required "clear and especial words" before finding that Congress intended to convey the beds of navigable waters during the territorial period. Thus, *Shively*, held that "a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any land below high watermark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention". See also *United States v. Pacheco*, 69 U.S. (2 Wall) 587 (1864) (absent express language, land "by the bay" is bounded by ordinary high watermark).

In 1987, this Court once again reaffirmed the strength of the presumption against pre-statehood conveyances of the beds of navigable waters, holding that the United States had not reserved to itself the bed of Utah Lake prior to Utah statehood. *Utah Div. of State Lands v. United States*, 482 U.S. at 193.

When analyzing a claimed pre-statehood conveyance, this Court's decisions from *Shively* to *Utah Division of State Lands*, speak to Congress' power to authorize pre-statehood conveyances:

"We cannot doubt, therefore, that *Congress* has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively*, 152 U.S. at 48, quoted in *Utah Division of State Lands*, 482 U.S. at 196-97 (emphasis added).

With regard to executive power to convey submerged lands, the Court has confirmed that Congress never authorized conveyances that would defeat a future State's title to submerged lands through general delegations to the executive branch. See *Utah Division of State Lands*, 482 U.S. at 197 ("Congress had never undertaken by general land laws to dispose of land under navigable waters"). Instead, Congress has pursued a long-standing policy to authorize a conveyance of submerged lands "only 'in case of some international duty or public exigency.'" *Id.*, quoting *Shively*, 152 U.S. at 50.

Utah Division of State Lands demonstrates the strength of the presumption against including submerged lands in a pre-statehood reservation. Prior to Utah's statehood, Major John Wesley Powell, director of the U.S. Geological Survey ("U.S.G.S."), informed the Secretary of the Interior that the "site of Utah Lake . . . is hereby selected as a reservoir site, together with all lands situated within two statute miles of said lake at high water." Congress had granted the U.S.G.S. express authority to select "sites to

reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows." 25 Stat. 505, 526. The Act further provided:

"[A]ll the lands which may hereafter be designated or selected . . . are from this time henceforth reserved from sale *as the property* of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law." *Utah Division of State Lands*, 482 U.S. at 198-99 (emphasis added).

Nevertheless, the Court held, the United States did not retain title to the bed of Utah Lake when Utah became a state:

"[T]he 1888 Act fails to make sufficiently plain either a congressional intent to include the bed of Utah Lake within the reservation or an intent to defeat Utah's claim to title under the Equal Footing doctrine." *Id.* at 203 (emphasis added).

C. As A Matter Of Law, The 1873 Executive Order Reserving Lands For Use By the Coeur D'Alene Tribe Cannot State A Claim For A Pre-Statehood Conveyance of Submerged Lands.

The Tribe's claim in the instant case is inconsistent with the decisions of this Court from the cases summarized in *Shively* to the present. First, the executive branch had no inherent authority to convey submerged lands. Second, Congress cannot impliedly delegate to the executive power to defeat a future State's equal footing title to

submerged lands. Third, the Tribe points to no Congressional action expressly delegating such power to the executive.

Prior decisions make it clear that the executive had no inherent power to convey submerged lands to Indians. "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority." *Sioux Tribe v. United States*, 316 U.S. 317, 326 (1941).

In *Sioux Tribe*, this Court held that the executive had no inherent power to convey general public lands to tribes during the territorial period. The executive merely had power to reserve and manage public lands as a result of Congress's "long-continued acquiescence in the exercise of that power." *Id.*; see also *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (Congress impliedly delegated power through long acquiescence in executive orders reserving lands from mineral laws).

The implied delegation of power to the executive branch found in *Sioux Tribe* and *Midwest Oil Co.* is narrow and limited. After reviewing the history relating to executive creation of Indian reservations, this Court held that Congress would never have understood that the executive was permanently disposing or conveying the reserved lands to the tribes without Congress' approval. The only Congressional understanding was that the executive gave the tribes a revocable license to occupy public lands and to remove such lands from operation of homestead or other general land laws. *Sioux Tribe*, 316 U.S. at 327-28.

The Coeur D'Alene Tribe therefore fails to state a claim because it cannot, merely by citing the executive order, show that Congress intended to authorize conveyance of submerged lands and deliberately intended to defeat the future State of Idaho's equal footing title. First, the Tribe cannot rely on the executive's limited power to convey public lands and therefore must show that Congress delegated the power. Second, Congress' responsibility for preserving the equal footing of future states means that it cannot delegate power by mere acquiescence in an executive order withdrawing lands for Indian use. As shown in *Sioux Tribe*, the implied delegation of power by Congressional acquiescence is limited to authorizing Executive actions that were clear and necessary. Third, the Tribe cites no express Congressional delegation of authority to convey lands and to defeat Idaho's equal footing title.⁵

For *Midwest Oil* to have applied to this case, Congress would have to have known that the 1873 executive order at issue clearly and deliberately intended to convey the bed and banks of navigable waters. The executive order, however, merely provided that:

"It is hereby ordered that the following tract of country in the Territory of Idaho be, and the

⁵ Indeed, yet another hurdle exists. In *State of South Dakota v. U.S. Dept. of the Interior*, 69 F.3d 878 (Eighth Cir. 1995), the court held that 25 U.S.C. § 465, authorizing the acquisition of land in trust for Indian tribes, was invalid because of lack of sufficient specific standards. Here, any applicable statutory authority falls just as short of the "intelligible principles" required by this Court. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

same is hereby, *withdrawn from sale* and set apart as a reservation for the Coeur D'Alene Indians. . . ." 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties*, 837 (1904) (emphasis added).

The 1873 Order did not specifically mention any executive intent regarding permanent conveyance of the bed or banks of navigable waters in derogation of the sovereignty of the future State of Idaho. Congress merely acquiesced in withdrawing certain lands from sale so that they could be used by Indians. However, submerged lands were never for sale prior to statehood under the general land laws.

The Court of Appeals offered no reasoning to support its implicit holding that the executive order might have conveyed the bed and banks of submerged lands. The Court of Appeals only noted that none of its prior opinions "consider[ed] the possibility that such a claim might be defeated by a lack of explicit congressional authorization of the executive order." *Coeur D'Alene Tribe*, 42 F.3d at 1257. Failure to consider an issue in prior cases, however, is not precedent.

As a matter of law, the Tribe's complaint based on the 1873 Executive Order cannot show clear and especial Congressional intent to convey submerged lands. Congress never intended to deprive the future State of Idaho of its constitutional equal footing rights by authorizing permanent conveyance of the submerged lands to Coeur D'Alene Indians.

D. Principles Of Federalism Require Clear and Specific Congressional Intent To Authorize Conveyance Of Lands.

Mere Congressional acquiescence cannot be a basis to upset the Constitutional framework and diminish the sovereignty of future states. Clear and specific Congressional intent must be required to find that the United States authorized a pre-statehood conveyance of submerged lands and altered the sovereignty of a state.⁶ Otherwise, a fundamental part of the federalism and constitutional balance is determined unilaterally by a particular executive action. Changing the constitutional balance, however, should require the deliberate and responsible actions of Congress. Congress must be shown to have deliberately and knowingly intended such an alteration.

The reasoning below contradicts the express limits on executive power found in *Sioux Tribe*. Instead, with an erroneous, over-broad statement, the Court of Appeals effectively overrules *Sioux Tribe* and determines that the

⁶ Compare *Organized Village of Kake v. Egan*, 361 U.S. 60, 75-76 (1962), with *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). In *Metlakatla Indian Community*, Congress had granted the Secretary power to make rules governing Indian use of the Metlakatla reservation. See 369 U.S. at 54 and 59. With this express Congressional power, the Secretary could authorize Indian fishing within the reservation boundaries, preempting Alaska law. In contrast, Congress had not granted the Secretary power to authorize the Village of Kake Indian residents to fish contrary to Alaska law and the Secretary had no "inherent authority." See also *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 105 (1949).

executive branch had all the powers of Congress to convey submerged lands prior to statehood when Congress had no intent to defeat the equal footing title of a future state.

CONCLUSION

The decision below will affect all the states, for it effectively permits the circumvention of state sovereign immunity and the Eleventh Amendment by the enlargement and grossly inappropriate use of the officers' suit. Its particular application – to states' navigable waters, acquired as an incident of sovereignty – is especially egregious, for it needlessly derogates state sovereignty by imposing an inappropriate common law remedy to defeat the constitutional rights of states, even though the lower court admits that the remedy is inappropriate and will not remedy the cloud on title caused by state claims.

A full and adequate remedy exists – in the form of quiet title in state court. Should such a court err in its application of federal law, review is available within the federal judicial system. State courts have adjudicated property disputes – and other disputes – involving questions of federal law since the beginning of the Republic. The opinion below assumes that a state forum is so suspect as to require resort to an officers' suit in federal court to vindicate the Tribe's rights, even though the relief sought is unavailable there. Such a decision hardly does credit to our federal system.

Finally, this abuse of *Ex parte Young* takes place within a context in which basic principles of constitutional law are violated. Despite this Court's repeated admonitions that the navigable waters are held in trust for the future states, and pre-statehood conveyances – to the extent they may be made at all – must be plainly and expressly made by Congress, the lower court found an issue of fact as to whether an executive order showing no intention of such a transfer and unsupported by congressional authority can deprive a future state of one of the incidents of its sovereignty.

The lower court's opinion stems from an unfortunate theory of federalism embodying "ever expanding federal authority at the expense of the states." Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. at 86 (1989). It cries out for correction.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF IDAHO, *et al.*,
v. *Petitioners*,
COEUR D'ALENE TRIBE, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL LEAGUE OF CITIES,
INTERNATIONAL CITY/COUNTY
MANAGEMENT ASSOCIATION,
U.S. CONFERENCE OF MAYORS, AND
NATIONAL ASSOCIATION OF COUNTIES
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Amici will address the following question:

Whether the Eleventh Amendment prohibits a federal court from exercising jurisdiction over an action for declaratory and injunctive relief which would cloud a State's title to property.

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AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

INTEREST OF THE AMICI CURIAE

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The

Eleventh Amendment is one of the principal constitutional protections of state sovereignty. This case therefore presents an issue of fundamental importance to *amici* and their members—whether notwithstanding the Eleventh Amendment's prohibition against a federal court adjudicating a State's interest in property absent its consent, federal courts can grant declaratory and injunctive relief against state officials which has the practical effect of conveying a portion of the State's property interest.

Invoking *Ex Parte Young*, 209 U.S. 123 (1908), the court of appeals sanctioned the award of declaratory and injunctive relief against state officials even though it would result in neither the State nor the Tribe “hold[ing] unclouded title to the property.” Pet. App. 22a. Indeed, the granting of the relief authorized by the court of appeals might well prompt inconsistent judgments, which would turn the disputed area into a no man's land and prevent this controversy from ever being conclusively resolved. Even if this suit could be fairly characterized as not adjudicating the State's interest in property, a suit brought under the *Young* doctrine remains subject to traditional equitable principles. These principles require the federal courts to remit the Tribe to the quiet title remedy available in the state courts, which can provide a complete resolution of this dispute.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.¹

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

The Coeur D'Alene Tribe of Idaho brought this action in federal district court against the State of Idaho, its agencies and various state officials seeking to quiet title in the Tribe to the beds, banks, and waters of all navigable watercourses located within the boundaries of the Tribe's reservation as established by an 1873 executive order. See Pet. App. 30a. The Tribe's complaint sought an order quieting the Tribe's title in the disputed area as well as declaratory relief establishing the Tribe's right “to the exclusive use and occupancy and the right to quiet enjoyment” of the disputed area and the invalidity of various Idaho statutes and ordinances applicable therein. Opp. App. 12a-14a. Finally, the Tribe sought to enjoin the State, its agencies and officials “from regulating, permitting or taking any action in violation of the [Tribe's] rights of exclusive use and occupancy” in the disputed area. *Id.* at 14a.

The State moved to dismiss the Tribe's suit as barred by the Eleventh Amendment. Pet. App. 31a. The district court granted the motion, dismissing the Tribe's action in its entirety. The court first held that the Eleventh Amendment barred the Tribe's claims against the State and its agencies. See *id.* at 32a-37a. With respect to the Tribe's claims against the state officials, the court concluded “that the declaratory relief sought by the Tribe *would* have the same effect as an award of damages or restitution.” *Id.* at 39a. Moreover, the Tribe, “by also suing the state officials to quiet title, and for declaratory judgment . . . is essentially attempting to execute an ‘end run’ around” the Eleventh Amendment's prohibition against suits in federal court seeking retroactive relief from a State. *Id.* (citing *Edelman v.*

Jordan, 415 U.S. 651 (1974)). Finally, with respect to the Tribe's claim for injunctive relief against the officials, the court reasoned that it was not within the exception created by *Ex Parte Young*, because the State "has been in rightful possession of all of the lands and waters at issue in this case since it entered the Union in 1890." Pet. App. 47a.

The court of appeals affirmed in part and reversed in part. To the extent the Tribe sought relief against the State and its agencies, the court upheld the district court's determination that the claims were barred by the Eleventh Amendment. *Id.* at 4a-10a. The court also held that the Tribe's quiet title claim against the state officials was barred by the Eleventh Amendment. *Id.* at 4a. The court held, however, that the Tribe was entitled to "a determination under federal law of [its] right to possess, use, and control the beds, banks, and waters of navigable waterways within the Coeur D'Alene Reservation in the future." *Id.* at 22a. While the court acknowledged that it could not adjudicate the State's interest in the disputed area, it further reasoned that "to the extent . . . the declaratory and injunctive relief binds state officials in accordance with what the district court finds to be the Tribe's right to the property, it is allowable." *Id.* Reasoning that "[b]ecause the state is unable to act in violation of federal law," the court concluded that "declaratory relief that determines what federal law is and requires state officials to act accordingly cannot be considered relief against the state." *Id.*

The court of appeals acknowledged "that if the Tribe ultimately prevails on the merits of this case, neither Idaho nor the Tribe will hold unclouded title to the property." *Id.* It nonetheless reinstated the Tribe's claims for declaratory and injunctive relief

against the officials, holding that under *Ex Parte Young* the federal courts "may not decline jurisdiction to the extent that it exists." *Id.*

SUMMARY OF ARGUMENT

1. The court of appeals' holding violates the Eleventh Amendment, which prohibits a federal court from adjudicating a State's interest in property without its consent. See *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699-700 (1982). The Tribe's remaining claims are only nominally against the State's officials; "the state is the real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (quoting *Ford Motor Co. v. Department of Treas. of Indiana*, 323 U.S. 459, 464 (1945)).

The court of appeals held that the Tribe could seek a declaratory judgment that it has the "right to possess, use, and control" the disputed area and "injunctive relief bind[ing] state officials in accordance with what the district court finds to be the Tribe's right to the property." Pet. App. 22a. The granting of such relief would violate the Eleventh Amendment, which bars even a suit brought against state officials for injunctive relief "when 'the state is the real, substantial party in interest.'" *Pennhurst*, 465 U.S. at 101 (quoting *Ford Motor*, 323 U.S. at 464). As the Tribe itself characterizes its claim, this is a dispute over the ownership of the beds, banks, and waters of navigable waters located within the boundaries of the 1873 reservation. See Pet. App. 3a. The various state officials sued by the Tribe have been named as defendants solely because of their duties under Idaho law in administering the State's ownership in trust of the disputed area. The

Tribe's suit is thus only nominally against the state officials; the State is the real, substantial party in interest.

The nature of the relief sanctioned by the court of appeals does not alter this conclusion. A federal court's declaratory judgment that the Tribe has the "right to possess, use and control" the disputed area coupled with injunctive relief binding state officials in accordance with the Tribe's right to the property, amounts to no less than the granting of equitable ownership of the disputed area to the Tribe. Under such a decree, the Tribe would be able to exclude the public from use of the area. The federal court's decree would thereby divest the State and its people of their equitable interest in the property in violation of the Eleventh Amendment.

2. *Ex Parte Young* and other cases in which this Court has sanctioned the use of fictional suits against governmental officials to provide a remedy for the deprivation of property do not support the court of appeals' holding. In more recent cases, this Court has explained that the use of fictional suits against governmental officials was necessitated by the absence of a remedy against the sovereign itself. *See, e.g., Malone v. Bowdoin*, 369 U.S. 643 (1962). The rationale of these cases is that unless such suits were deemed to be against the officials and not the sovereigns, there would have been no effective remedy for the illegal deprivation of property. Idaho, however, has waived its sovereign immunity from quiet title actions brought in state court. The availability of this remedy renders unnecessary the sanctioning of a suit against the State's officials.

Moreover, the court of appeals' assertion that *Ex Parte Young* requires a federal court to exercise

jurisdiction "to the extent that it exists" (Pet. App. 22a-23a), rests on the erroneous premise that a federal court lacks discretion to refuse to hear the Tribe's claims for equitable relief. This Court has recognized, however, that a suit brought under the *Young* doctrine remains subject to traditional equitable principles, which in a proper case may require a federal court to decline to exercise its jurisdiction. *See, e.g., Younger v. Harris*, 401 U.S. 37 (1971).

The exercise of federal court jurisdiction over the Tribe's claims for declaratory and injunctive relief would violate fundamental principles of equity jurisprudence. As the court of appeals acknowledged, "if the Tribe ultimately prevails on the merits of this case, neither Idaho nor the Tribe will hold unclouded title to the property." Pet. App. 22a. The exercise of federal jurisdiction over the Tribe's claims could turn the disputed area into a no man's land as the Tribe asserts its right under the federal court's equitable decree to exclude the public from the area, and members of the public assert their right to use the area under the State's legal title.

Indeed, the exercise of federal jurisdiction might prevent there ever being a conclusive resolution of this dispute. As the court of appeals acknowledged, a judgment in the Tribe's favor against the State's officials, while granting the incidents of equitable title, cannot bind the State. The State would be fully within its sovereign prerogative to bring suit in its own courts, which are bound to follow only the determinations of federal law made by this Court and not the lower federal courts. The State might thus obtain a judgment "quieting its title" which, at its core, conflicts with the judgment rendered by the federal courts. Absent this Court's granting review

and vacating one of these judgments, there may never be a definitive resolution of the dispute.

The exercise of federal jurisdiction over the Tribe's claims thus presents a very substantial likelihood of causing irreparable harm to both the Tribe and the State. Equitable principles require that the Tribe be remitted to the quiet title remedy which is available in the Idaho courts.

ARGUMENT

THE ELEVENTH AMENDMENT BARS THE TRIBE'S SUIT

This Court has long recognized that the Eleventh Amendment precludes a federal court from adjudicating a State's interest in property absent its consent. See *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699-700 (1982); *In re New York (II)*, 256 U.S. 503, 511 (1921). While the court of appeals acknowledged this fundamental principle (see Pet. App. 16a), it nonetheless held that, under *Ex Parte Young*, 209 U.S. 123 (1908), the Tribe could seek a declaratory judgment determining its "right to possess, use, and control the beds, banks, and waters of navigable waterways" and "injunctive relief bind[ing] state officials in accordance with what the district court finds to be the Tribe's right to the property." Pet. App. 22a. Most remarkably, the court sanctioned such relief even though it "recognize[d] that if the Tribe ultimately prevails on the merits of this case, neither Idaho nor the Tribe will hold unclouded title to the property." *Id.*

It is clear that in the event the Tribe prevails and Idaho no longer "hold[s] unclouded title to the property," *id.*, the lower federal courts will have adjudicated at least a portion of the State's interest in

property absent its consent—in plain violation of the Eleventh Amendment. But even if one were to accept the view that allowing this suit to go forward does not violate the Eleventh Amendment, the court of appeals' sanctioning of a suit against the State under the fiction of *Ex Parte Young* is unwarranted and unwise.

As explained below, the court of appeals' holding is an invitation to uncertainty and duplicative litigation. Indeed, federal court intervention, through the fiction of *Ex Parte Young*, might well result in there never being a conclusive resolution of this dispute, a grave consequence for both the Tribe and the people of Idaho. Contrary to the reasoning of the court of appeals that it could "not decline jurisdiction to the extent that it exists," *id.*, courts of equity have long exercised a reasoned discretion in deciding whether to adjudicate a dispute within their jurisdiction. See, e.g., David L. Shapiro, *Jurisdiction And Discretion*, 60 N.Y.U. L. Rev. 543, 548-49 (1985). The court of appeals' sanctioning of a suit against the State under the fiction of *Ex Parte Young* is inappropriate under traditional equitable principles. Moreover, it is unnecessary because Idaho has waived its immunity from quiet title actions brought in its own courts. The judgment of the court of appeals should therefore be reversed.

I. THE ELEVENTH AMENDMENT BARS A FEDERAL COURT FROM ADJUDICATING A STATE'S INTEREST IN PROPERTY

A. This Court has long "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114,

1122 (1996) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)). As the Court recently reaffirmed, "[t]hat presupposition . . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."'" *Id.* (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting *The Federalist* No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton))). See also *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (The Eleventh Amendment's "greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.").

This limitation on the authority of a federal court to summon before it one of the States is fully applicable where, as here, an entity other than the United States or one of its sister States brings a suit. See *Blatchford*, 501 U.S. at 779-82. It applies not only when the relief sought is an award of damages from the State, see *Edelman v. Jordan*, 415 U.S. 651, 668-71 (1974), but also to a suit against a State seeking equitable relief. See *Pennhurst*, 465 U.S. at 100-01; *Missouri v. Fiske*, 290 U.S. 18, 27 (1933). It thus applies to every suit which seeks to adjudicate a State's interest in property, whether it is an action for damages or for equitable relief. See *Treasure Salvors*, 458 U.S. at 699-700; *In re New York (II)*, 256 U.S. at 511.

The Court has further held that "[t]he Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" *Pennhurst*, 465 U.S. at 101 (quoting *Ford Motor Co. v. Department of Treas. of Indiana*, 323 U.S. 459,

464 (1945)). "And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Id.* at 101-02 (citing *Cory v. White*, 457 U.S. 85, 91 (1982)).

The Court has excepted from the bar of the Eleventh Amendment a suit for prospective relief challenging the conduct of a state official as violative of federal law. See *Ex Parte Young*, 209 U.S. at 159-60. But as the Court has made clear, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst*, 465 U.S. at 102; see also *Seminole Tribe*, 116 S.Ct. at 1132-33. A suit brought under the *Young* doctrine remains subject to traditional equitable principles, which in a proper case may require a federal court to decline to exercise its jurisdiction. See *Younger v. Harris*, 401 U.S. 37, 43-46 (1971); *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926); Shapiro, *Jurisdiction And Discretion*, 60 N.Y.U. L. Rev. at 549.

B. These principles compel the dismissal of the Tribe's claims for declaratory and injunctive relief, regardless of whether the suit is deemed to be a suit against the State or an action under *Ex Parte Young*. As the Tribe's complaint characterizes its claim, this is a dispute over "the ownership of the beds and banks and all waters of all navigable water courses within the 1873 Coeur D'Alene reservation boundary." Opp. App. 3a. The various state officials sued by the Tribe have been named as defendants solely because of their duties under Idaho law in administering the State's ownership in trust of the disputed areas. See *id.* at 5a-6a (Complaint). The Tribe's suit is only nominally against the State's

officials; the State is plainly "the real, substantial party in interest." *Pennhurst*, 465 U.S. at 101 (quoting *Ford Motor*, 323 U.S. at 434).

The nature of the relief sanctioned by the court of appeals does not alter this conclusion. A federal court's declaratory judgment that the Tribe has the "right to possess, use and control the beds, banks, and waters of navigable waterways" within the disputed area and "injunctive relief bind[ing] state officials in accordance with . . . the Tribe's right to the property" (Pet. App. 22a), amounts to no less than the granting of the equitable ownership of the disputed area to the Tribe. As a leading authority explains:

The chief incidents of the ownership of property are the right to its possession, the right to its use, and the right to its enjoyment, according to the owner's taste and wishes, free from unreasonable interference, usually to the exclusion of all others. The power to prevent members of the public from using property in a manner contrary to the wishes of the owner is part of the rights traditionally associated with the ownership of private property.

73 C.J.S. *Property* § 27 (1983) (citations omitted).

If granted by the district court, the relief sanctioned by the court of appeals would effectively revoke the public trust which the State maintains on behalf of all people, including the members of the Tribe, over the disputed area. See *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892). Even a decree limited to declaring "the Tribe to be the owner of the property against all claimants except the State" (Pet. App. 22a), would result in the Tribe being able to exclude the public from the use of the area and its waters. This is because the injunctive

component of the decree—binding the State's officials in accordance with the Tribe's rights in the property—would prohibit state officials from protecting the public in its use and enjoyment of it. It is obvious that such an order, binding on the officials who administer the State's lands in trust for its people and which effectively grants the Tribe equitable title to the disputed area, adjudicates a substantial, if not the most important, portion of the State's interest in property. Indeed, the court of appeals' recognition that in the event this relief was granted, the State would no longer "hold unclouded title to the property," *id.* at 22a, belies the notion that such an order does not adjudicate the State's interest in property. The "essential nature and effect of the proceeding," *Ford Motor*, 323 U.S. at 464, is to divest the State and its people of their equitable interest in the property.²

² The court of appeals asserted that the declaratory and injunctive relief it sanctioned was permissible under the Eleventh Amendment because it "would not compensate for past violations of federal law, but would instead preclude future violations." Pet. App. 21a. This Court's cases make clear, however, that a federal court must examine a remedy's practical effect in determining whether it violates the Eleventh Amendment. See, e.g., *Green v. Mansour*, 474 U.S. 64, 73 (1985) (invalidating issuance of declaratory judgment because it "would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment"); *Edelman*, 415 U.S. at 668 (invalidating an award of "equitable restitution" because "it is in practical effect indistinguishable from an award of damages against the State"). Because the declaratory and injunctive relief sanctioned by the court of appeals has the practical effect of granting equitable title to the Tribe, it divests the State of a property interest. It is accordingly barred by the Eleventh

The Tribe's claims for declaratory and injunctive relief are thus only nominally against the State's officials, cf. *In re New York (I)*, 256 U.S. 490, 501-02 (1921); rather, "the [S]tate is the real, substantial party in interest." *Pennhurst*, 465 U.S. at 101 (quoting *Ford Motor*, 323 U.S. at 464). Because the Tribe's suit seeks to adjudicate the State's interest in its property and Idaho has not waived its immunity from such a suit in the federal courts, it is barred by the Eleventh Amendment. See *Treasure Salvors*, 458 U.S. at 699-700; *In re New York (II)*, 256 U.S. at 511.

II. THE EXERCISE OF FEDERAL JURISDICTION OVER THE TRIBE'S CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF WOULD VIOLATE SETTLED PRINCIPLES OF EQUITY JURISPRUDENCE AND COULD HAVE HIGHLY DISRUPTIVE CONSEQUENCES

Ignoring this Court's command that it examine "the essential nature and effect of the proceeding" to determine whether or not the Tribe's suit is a suit against the State, *Ford Motor*, 323 U.S. at 464, the court of appeals invoked the doctrine of *Ex Parte Young* and other fictional devices to subject the State to the Tribe's claims for declaratory and injunctive relief. The court of appeals' holding is unjustifiable and unpersuasive. Indeed, its instruction to the district court that if it "finds that the property at issue belongs to the Tribe pursuant to federal law, it may decree the Tribe to be the owner of the property against all claimants except the State of Idaho and its agencies" (Pet. App. 22a), is extraordinarily problematic. As the court of appeals itself recognized,

Amendment. See *Treasure Salvors*, 458 U.S. at 699-700; *In re New York (II)*, 256 U.S. at 511.

"if the Tribe ultimately prevails on the merits of this case, neither Idaho nor the Tribe will hold unclouded title to the property." *Id.*

The court of appeals' approach has the very real potential to turn the disputed area into a veritable no man's land. It is inconsistent with the approach this Court has taken in recent cases and violates settled principles of equity jurisprudence. To the extent the Tribe's suit establishes a violation of its federal rights, the supremacy of federal law can be vindicated in a suit brought in the Idaho courts which is subject to review by this Court.

A. Because Idaho Provides A Remedy For The Tribe's Claim, The Use Of A Fictional Suit Against The State's Officers Is Unwarranted

As support for its holding, the court of appeals relied principally on *Ex Parte Young*, *Treasure Salvors*, and a line of cases which includes *Tindal v. Wesley*, 167 U.S. 204 (1897). See Pet. App. 14a-16a, 19a-23a. These cases do not, however, support the problematic holding of the court of appeals. This Court's rejection of the use of fictional devices to adjudicate the United States' interest in property through suits brought nominally against government officials, see, e.g., *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682 (1949), compels the dismissal of the Tribe's claims.

Admittedly, in cases such as *Tindal* and *United States v. Lee*, 106 U.S. 196 (1882), the Court rejected arguments that suits against government officials in possession of property were suits against the sovereign, reasoning that possession of property in violation of law divested the official of the sover-

eign's immunity. See *Tindal*, 167 U.S. at 221-22; *Lee*, 106 U.S. at 218-21. But at the time of these cases, the respective sovereigns, while bound by the terms of the applicable due process clauses, had not waived their immunities. See, e.g., *Malone*, 369 U.S. at 647-48 & n.8; *Larson*, 337 U.S. at 697 nn.17-18. Absent the Court's deeming these suits to be against the officials and not the sovereigns, the plaintiffs would have had no effective remedy for the illegal deprivation of their property. As the *Tindal* Court explained:

[I]f a State, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law, the citizen is remediless so long as the State, by its agents, chooses to hold his property; for . . . if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated.

167 U.S. at 222 (citation omitted).

In subsequent cases, however, the Court has made clear that the approach of *Tindal* and *Lee* is limited to those instances in which the sovereign itself has failed to provide an adequate remedy for the deprivation of a citizen's property. For example, in *Larson*, the Court held that a suit against the War Assets Administrator seeking specific performance of a contract was barred by the doctrine of sovereign immunity notwithstanding that it sought declaratory

and injunctive relief against the official. See 337 U.S. at 684-85, 695-705. The Court distinguished *Lee* observing that at the time it was decided, "there clearly was no remedy available by which [Lee] could have obtained compensation for the taking of his land," *id.* at 697 n.17, and that "[o]nly where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation does the *Lee* case require" a suit against an official to be deemed not to be a suit against the sovereign. *Id.* at 697. Returning to the suit before it, the *Larson* Court noted that "[t]here is no claim that [the administrator's] action constituted an unconstitutional taking," and that "[t]here could not be since the respondent admittedly has a remedy, in a suit for breach of contract, in the Court of Claims." *Id.* at 703 & n.27. The Court accordingly ordered the dismissal of the complaint. *Id.* at 705.

In *Malone*, the plaintiffs brought an action of ejectment against a U.S. Forest Service Officer, asserting their ownership of a parcel of land occupied by the federal government. See 369 U.S. at 643-44. The official moved to dismiss on "the ground that the suit was in substance and effect one against the United States, which had not consented to be sued, or waived its immunity from suit." *Id.* at 645. The district court granted the motion but the court of appeals reversed on the authority of *Lee*. *Id.*

This Court reversed, ordering the dismissal of the complaint. In so holding, the Court again observed that, unlike in *Lee*, the "respondents could seek just compensation for the taking of their land by the United States" in the Court of Claims, *id.* at 647 n.8, and that *Lee* "has continuing validity only 'where there is a claim that the holding constitutes an uncon-

stitutional taking of property without just compensation.' " *Id.* at 648 (quoting *Larson*, 337 U.S. at 697). The Court thus concluded that the suit "was rightly dismissed by the District Court as an action which in substance and effect was one against the United States without its consent." ^a *Id.*

As the foregoing demonstrates, where the sovereign provides an adequate remedy for the deprivation of property by its agents, the due process clause is satisfied and there is no need for courts to provide additional remedies through the fictional device of a suit against the sovereign's officials. This principle, which is equally applicable in a suit brought against state officials, see *Tindal*, 167 U.S. at 213, compels the dismissal of the Tribe's remaining claims. Here, while Idaho has not waived its Eleventh Amendment immunity, it has waived its sovereign immunity from a suit to quiet title in its own courts. See Idaho Code § 5-328.

The Tribe's boilerplate assertion that it has no adequate remedy at law (see Opp. App. 11a (Complaint ¶ 30)), does not negate the fact that it can pursue its quiet title action in the state courts. Nor does the court of appeals' apparent belief that a State's pay-

^a More recently, this Court ordered the dismissal, on sovereign immunity grounds, of a suit for declaratory and injunctive relief brought by North Dakota against federal officials which sought to adjudicate the federal government's ownership interest in the Little Missouri River. See *Block v. North Dakota, ex rel. Board of Univ. & Sch. Lands*, 461 U.S. 273, 277-78, 280-86 (1983). Observing that Congress had enacted a scheme which waived the United States' sovereign immunity in quiet title actions, see Quiet Title Act of 1972, Pub. L. 92-562, 86 Stat. 1176, the Court declined to sanction the use of a fictional suit against federal officials. See 461 U.S. at 284-86.

ment of just compensation does not provide an adequate remedy when Indian lands are the subject of a taking (see Pet. App. 17a n.8 ("states cannot provide a remedy for the taking of Indian lands that are held pursuant to federal law")), support the sanctioning of a fictional suit against the State's officers to circumvent the State's Eleventh Amendment immunity. Even if this a correct statement of the law, it is irrelevant to the resolution of this title dispute. Here, the Tribe can test the validity of Idaho's title in the state courts, subject to review by this Court. The availability of this remedy, which would provide the Tribe with full relief, renders unnecessary the court of appeals' sanctioning of a suit against the State's officials.

B. The Exercise Of Federal Court Jurisdiction Over The Tribe's Claims For Declaratory And Injunctive Relief Would Violate Equitable Principles And Could Cause Grave Harm

Asserting that "we may not decline jurisdiction to the extent that it exists," the court of appeals held that *Ex Parte Young* requires a federal court to exercise jurisdiction over the Tribe's claims for declaratory and injunctive relief. Pet. App. 22a-23a. The court of appeals' holding rests, however, on the erroneous premise that a federal court lacks discretion to refuse to hear the Tribe's claims for equitable relief. As this Court has recognized, a suit brought under the *Young* doctrine remains subject to traditional equitable principles, which in a proper case may require a federal court to decline to exercise its jurisdiction. See *Younger*, 401 U.S. at 43-46, 53-54; *Fenner*, 271 U.S. at 243-44; see also *Green*, 474 U.S. at 72 ("[t]he propriety of issuing a declaratory judgment may depend upon equitable considerations"). The Tribe's

suit is an especially inappropriate case for the exercise of federal equity jurisdiction; the granting of the Tribe's claims for declaratory and injunctive relief would be inconsistent with the fundamental purpose of equity jurisdiction and could well result in there never being a conclusive resolution of this dispute.

As Justice Story explained in the leading treatise on equity practice, it is

the common expression that courts of equity delight to do justice, and not by halves. And hence, also, it is a general rule of equity . . . that all persons materially interested, either legally or beneficially, in the subject-matter of the suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it or to others who are interested in the subject matter

Joseph Story, *Commentaries on Equity Pleadings* § 72 (10th ed. 1870) (quoted in 1 C.L. Bates, *Federal Equity Procedure* § 39, at 41-42 (1901)); see also *Gregory v. Stetson*, 133 U.S. 579, 586 (1890) (quoting *id.*).

It is thus the rule that "both the legal and equitable title should be before the court, and be disposed of and bound by the decree, so as to prevent future suits in regard to the same matter, either at law or in equity." 1 Bates, *Federal Equity Procedure* § 40, at

42. Correlative to this is the "inflexible principle" that "the court can make no decree between the parties before it which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without materially and directly affecting the rights of the absent person." *Id.* § 42, at 44. It is thus also the rule that a suit in equity should be dismissed if "some other Court of Equity is invested with the proper jurisdiction." Joseph Story, *Commentaries on Equity Pleadings* § 486, at 379 (2d ed. 1840).⁴

The exercise of federal court jurisdiction over the Tribe's claims for declaratory and injunctive relief would violate these fundamental principles of equity jurisprudence. Here, while a federal court's issuance of declaratory and injunctive relief would have the practical effect of granting the Tribe equitable title, it cannot adjudicate the State's interest in the disputed area. As the court of appeals acknowledged, "if the Tribe ultimately prevails on the merits of this case, neither Idaho nor the Tribe will hold unclouded title to the property." Pet. App. 22a. But this is precisely why the federal courts' exercise of equitable jurisdiction over the Tribe's claims would be improper. Courts of equity exercise their powers to remove clouds on title, not to create them. See *Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 449 (1892). Where, as here, the Eleventh Amendment denies the lower federal courts jurisdiction to render

⁴ It is, of course, also the rule that "[n]o suitor may ask from any judicial tribunal a form of relief which upon settled principles of law is detrimental to the public welfare." 1 Fred F. Lawrence, *A Treatise On The Substantive Law Of Equity Jurisprudence* § 48, at 77 (1929).

a decree adjudicating both a State's legal and equitable interests in property, a federal court should not resort to fictional pleading devices which can only lead to uncertainty and confusion.

To be sure, this Court formerly sanctioned the use of fictional suits against government officials in possession of real property as a means of overcoming the bar of sovereign immunity. See *Tindal*, 167 U.S. at 221-22; *Lee*, 106 U.S. at 218-21. The fictional device sanctioned in *Tindal* and *Lee*, the action of ejectment, was, however, an action at law. See Jonathan M. Landers *et al.*, *Civil Procedure* 367 (2d ed. 1988). As such, a court generally lacked discretion to refuse to proceed. But extending the rationale of these cases to authorize a federal court to hear the Tribe's claims for declaratory and injunctive relief against the State's officials, as the court of appeals did, is not only unnecessary, it is a prescription for uncertainty and additional litigation. In this regard as well, the court of appeals' holding violates traditional equitable principles.

As this Court's cases continue to recognize, the notion that a suit against the government's officials for the recovery of property is not a suit against the sovereign necessarily rests on the premise that the judgment does not estop the State from pursuing its claims. As the *Tindal* Court explained:

It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is

without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute.

167 U.S. at 223; see also *Lee*, 106 U.S. at 222. Consistent with this view, the Court in *Treasure Salvors* held that while the Eleventh Amendment does not bar a federal court from issuing a process ordering the arrest of property held by state officials, it nonetheless bars a federal court from adjudicating the State's interest in the property. See 458 U.S. at 687-88, 699-700.

As *Lee*, *Tindal* and *Treasure Salvors* demonstrate, the fictional suit against government officials for the recovery of property has the substantial limitation that it cannot bind the State itself. While it may have been tolerable to judicially sanction this type of suit when a sovereign had not waived its immunity and the remedy sought was legal in nature, to do so here, where the extraordinary remedies of declaratory and injunctive relief are sought, would violate the most fundamental principles of equity jurisprudence. The court of appeals' holding that the Tribe can seek these remedies notwithstanding that it would result in neither the Tribe nor the State holding unclouded title (see Pet. App. 22a), would turn the disputed area into a no man's land. It would create uncertainty and prompt years of additional litigation.

Indeed, because the exercise of federal jurisdiction in a suit such as this one is necessarily incomplete, it presents a very real possibility that the dispute

may never be definitively resolved. As the court of appeals recognized, a judgment in the Tribe's favor against the state officials cannot bind the State (though it nonetheless conveys all the incidents of equitable title). The State would be well within its legal rights to bring suit to quiet its title. And the State would be well within its sovereign prerogative to bring its suit in its own courts, which are bound to follow only the determinations of federal law made by this Court and not those of the lower federal courts.⁶ At most the State could obtain a judgment "quieting its title" which, at its core, conflicts with, but cannot supersede, the judgment rendered by the federal courts.

The existence of these inconsistent judgments could well result in a consequence far more serious than "neither Idaho nor the Tribe . . . hold[ing] unclouded title to the property." Pet. App. 22a. Indeed, it is potentially a prescription for anarchy as the Tribe, under the authority of the federal judgment, asserts the right to exclude members of the public from the use of the disputed area while members of the public, under authority of the state judgment, assert their right to use the disputed area. And because state officials may very well have been enjoined from enforcing state laws in the disputed area, *id.*, there is an evident potential for confrontations which breach

⁶ In bringing such an action, the State might well have to contend with years of additional litigation regarding whether the federal court's injunction restrains its officials from prosecuting a suit to vindicate the State's title. See Opp. App. 12a-14a (Tribe's Complaint ¶¶ 35 & 39; seeking to enjoin Idaho's officials from "taking any action in violation of the plaintiffs' rights of exclusive use and occupancy, quiet enjoyment and other ownership interest").

the peace. Absent this Court granting review and vacating one of the inconsistent judgments, the dispute may never be definitively resolved.

As the foregoing demonstrates, the lower federal courts' exercise of jurisdiction over the Tribe's claims for declaratory and injunctive relief cannot provide a complete resolution of this title dispute. Rather, such an incomplete adjudication is likely to prompt additional litigation and cause perpetual uncertainty. The exercise of federal jurisdiction thus presents a very substantial likelihood of causing irreparable harm to both the Tribe and the State.⁶

The Constitution granted federal courts equitable powers to remedy irreparable harm, not to create it. Because the exercise of federal court jurisdiction

⁶ In contrast to a suit brought by a Tribe, the United States can bring suit on a Tribe's behalf against a State in the federal courts to quiet title. See *United States v. Minnesota*, 270 U.S. 181, 193-95 (1926). In such a suit, a federal court can adjudicate the State's interest in property and render a complete decree. See *id.* This is because the States surrendered their immunity from suit by the United States as part of "the plan of the convention." *Blatchford*, 501 U.S. at 781 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (quoting *The Federalist* No. 81 (A. Hamilton))). The States made no such surrender with respect to suits brought directly by Indian Tribes. *Id.* at 781-82.

In this respect Indian Tribes, while retaining some attributes of sovereignty, are no different than individuals who cannot bring a quiet title action against a State in the federal courts absent the State's waiver of its Eleventh Amendment immunity. See, e.g., *Treasure Salvors*, 458 U.S. at 699-700. By operation of the relevant constitutional provisions, persons aggrieved by a State's deprivation of property must generally pursue their claims in the state courts. See *Williamson Co. Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-200 (1985).

over the Tribe's claims for declaratory and injunctive relief violates fundamental principles of equity jurisprudence, the Tribe must pursue its quiet title action in the Idaho courts, whose doors are fully open to it and whose judgments are reviewable by this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Interests of Amicus Curiae

The Stockbridge-Munsee Community is a federally-recognized Indian tribe. The Community was originally located in north central New York. Its lands were acquired by the State in a number of transactions that were never approved by the federal government. The Tribe has filed a claim to those lands under the Indian Commerce Clause and Indian Nonintercourse Act, 25 U.S.C. § 177 (1983). *Stockbridge-Munsee Community v. State of New York*, No. 86-CV-1140 (N.D.N.Y.). The defendants include the State, state officials, counties, and municipalities. The State and state officials have moved to dismiss the Community's claims based on the Eleventh Amendment.¹

The Community is interested in the correct application of *Ex Parte Young*, 209 U.S. 123 (1908), to Indian land claims. The Ninth Circuit's decision in *Coeur D'Alene Tribe of Idaho v. State of Idaho*, 42 F.3d 1244 (1994), correctly permits suits against state officials to enjoin ongoing violations of federal law.

Summary of Argument

Federal courts can enjoin violations of federal Indian statutes, such as the Nonintercourse Act, enacted under Congress' Indian Commerce Clause authority.

¹ Pursuant to Rule 37.3, written consents from counsel of record for the parties have been filed with the Clerk of the Court.

Argument

I. Introduction

The Indian Commerce Clause, art. 1, § 8, cl. 3, states that "Congress shall have the power . . . to regulate commerce . . . with the Indian tribes" Congress has passed a number of Indian statutes, under the Indian Commerce Clause, regulating a broad range of activities in Indian Country. The earliest and most fundamental of such legislation is the Nonintercourse Act² which has been consistently construed by courts to regulate states as well as private individuals in their dealings with Indian lands. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1980) *cert. den.* 452 U.S. 968 (1981). The Nonintercourse Act provides,

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the

² The Nonintercourse Act was initially passed in 1790, ch. 33, 1 Stat. 137. Congress passed a stronger, more detailed version in 1793. Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; *see also* the Act of May 19, 1796, ch. 30, 1 Stat. 469; the Act of Mar. 3 1799, ch. 46, 1 Stat. 743; the Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; the Act of May 6, 1822, ch. 58, 3 Stat. 682; Act of June 30, 1834, ch. 161, 4 Stat. 729. The Nonintercourse Act is now codified at 25 U.S.C. § 177 (1983).

Constitution

25 U.S.C. § 177. The Community has Nonintercourse Act claims against the State of New York which raise Eleventh Amendment issues.

II. Federal Courts Can Compel State Officials to Comply With Federal Law

State officials are not immune from suit when they violate the Constitution. In particular, if they withhold property obtained in violation of the Indian Commerce Clause, the federal courts can act to stop the violation.

One of the weaknesses in the Articles of Confederation was that they did not clearly delineate the division of authority between the states and the Confederal government in Indian affairs. "Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. 1, § 8, cl. 3, that granted Congress the power to regulate trade with the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. at 234 n.4. Of specific concern was the states' practice of treating with Tribes for land cessions. Clinton and Hotopp, *Judicial Enforcement of the Federal Restraint on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 36-37 (1979). The Indian Commerce Clause and the Nonintercourse Act changed that making Indian affairs the "exclusive province" of the federal government and the "extinguishment of Indian title [dependent upon] the consent of the United States."

County of Oneida, 470 U.S. at 234, 240.

The courts consistently acted to enforce those restrictions on alienation. *Id.* at 234-36; *see also Oneida Indian Nation v. County of Oneida*, 414 U.S. at 669-75. Although states were, in large part, the object of the Indian Commerce Clause and the Nonintercourse Act, it is only in recent times that Tribes have sued states and state officials for violations of those laws. *See e.g., Stockbridge-Munsee Community v. State of New York*, No. 86-CV-1140, *above*; *Mohegan Tribe v. Connecticut*, Civ. No. H-77-434 MJB (D. Conn.); *Golden Hill Paugussett Tribe v. Weicker*, No. 2:92CV00738 (PCD) (D. Conn.).

Such suits are not barred by the Eleventh Amendment. Sovereign immunity does not protect state officers when they violate the Constitution and federal statutes. *Ex Parte Young*, 209 U.S. 123. Land acquisitions made in violation of the Indian Commerce Clause and the Nonintercourse Act were "void *ab initio*". *County of Oneida*, 470 U.S. at 245. The acts of state officials in holding land so acquired is an ongoing violation of the Indian Commerce Clause and the Nonintercourse Act. It is just such acts that federal courts can enjoin pursuant to the *Ex Parte Young* doctrine.

The doctrine of *Ex Parte Young* developed in order to give "life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985). The "theory" is that "an unconstitutional statute is void . . . and therefore does not impart to [the official] any immunity from responsibility to the supreme authority of the United States.'" *Id.* (Citations

omitted). The *Ex Parte Young* doctrine was foreshadowed by decisions involving real property. In *Tindal v. Wesley*, 167 U.S. 204, 221 (1896), this Court held that the "settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf." *Tindal* relied on the earlier decision in *United States v. Lee*, 106 U.S. 196 (1882).

The "rule of law" set out in *Tindal* and *Lee* was clarified in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688 (1982). Those cases made clear that the "Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional." *Id.*, at 689.

The Indian land claim cases fit within the *Ex Parte Young* doctrine as prefigured by *Tindal* and *Lee* and interpreted in *Treasure Salvors*. Where state officers hold land acquired from tribes without federal consent, they are acting in violation of the Indian Commerce Clause and the Nonintercourse Act. The Eleventh Amendment does not protect them in that instance. *Treasure Salvors*, 458 U.S. at 689. Such an ongoing breach of federal law is "precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*." *Papasan v. Allain*, 478 U.S. 265, 282 (1986). Permitting relief against state

officers in these circumstances protects the federal interests embodied in the Indian Commerce Clause and the Nonintercourse Act.

Conclusion

The federal courts have authority to enforce federal Indian statutes against state officials.

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INTEREST OF *AMICUS*¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members. The ACLU was founded over seventy-five years ago to preserve and protect the fundamental principles of the Bill of Rights. It has appeared in numerous cases seeking to vindicate the deprivation of federally protected rights. *Amici* believe that if federal courts are to remain the paramount protectors of such rights, the doctrine enunciated by the Court in *Ex Parte Young*, 209 U.S. 123 (1908), must be reaffirmed. We respectfully submit this brief in the hope of assisting the Court as it considers the important issues presented by this case.

STATEMENT OF THE CASE

In 1991, the Coeur d'Alene Indian Tribe (the "Tribe") filed suit in the United States District Court for the District of Idaho against the State of Idaho, several state agencies and several state officials, including the members of the state Board of Land Commissioners. It sought quiet title to all submerged lands within the boundaries of its reservation, including Lake Coeur d'Alene, and declaratory and injunctive relief precluding state agencies and officials from regulating and interfering with its possession of the disputed property. The Tribe claimed title to the land pursuant to unextinguished aboriginal rights and an Executive Order, signed by President U. S. Grant on November 8, 1873, and ratified by Congress in 1891. *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244, 1247 (9th Cir. 1994).

Pursuant to Fed.R.Civ.P. 12(b), Idaho moved to dismiss the Tribe's complaint, arguing that the Tribe's action was

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

barred by the Eleventh Amendment and that the Tribe had failed to state a claim on which relief could be granted. By Order dated July 20, 1992, the district court granted Idaho's motion, dismissing the Tribe's suit in its entirety.

The district court concluded that the Eleventh Amendment barred all claims against Idaho and its agencies, and the claims for quiet title and declaratory relief against the state officials. *Coeur d'Alene Tribe of Idaho v. Idaho*, 798 F.Supp. 1443, 1446-9 (D. Idaho 1992). The court reasoned that the state officials were entitled to immunity with respect to the quiet title and declaratory relief claims because they were the functional equivalent of damages claims against Idaho. *Id.* at 1448-49, citing *Edelman v. Jordan*, 415 U.S. 651 (1974). Although the district court found that the officials were not entitled to sovereign immunity with respect to the Tribe's claims for injunctive relief, it nevertheless dismissed them after finding, as a matter of law, that Idaho had a right to possess the land at issue. 798 F.Supp. at 1452.

The Tribe appealed, and the United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. 42 F.3d at 1247-48. It agreed that the Eleventh Amendment bars all claims against Idaho and its agencies, as well as the quiet title claim against the officials. It found, however, that the Eleventh Amendment did not bar the Tribe's claims for declaratory or injunctive relief against the officials. Relying on this Court's plurality decision in *Florida Dep't Of State v. Treasure Salvors, Inc.*, 458 U.S. 679 (1982), it held that these claims were not claims for monetary damages, but only sought to preclude future violations of federal law and were therefore permissible under *Ex Parte Young* and its progeny.

It further found that it was conceivable that the Tribe could prove facts that would entitle it to the relief that it sought. Thus, it reversed the district court's dismissal of the

injunctive claims against the state officials and remanded the case back to the district court.² 42 F.3d at 1257.

This Court granted *certiorari* on April 16, 1996. This brief is limited to the question of whether the Eleventh Amendment bars the Tribe's action against the state officials for declaratory and injunctive relief.

SUMMARY OF ARGUMENT

The Tribe's claims against Idaho state officials for declaratory and injunctive relief fall squarely within the exception to the Eleventh Amendment articulated by the Court in *Ex Parte Young*. Under the *Young* doctrine, the Eleventh Amendment does not bar a federal court from adjudicating a claim for prospective declaratory and injunctive relief against state officials who allegedly act contrary to federal law. Here, the Tribe claims that Idaho state officials, by regulating and administering the land in question, are violating federal law. They are intruding on property rights conferred on the Tribe by a federal statute. The relief sought by the Tribe is prospective, as opposed to retrospective, in nature. It seeks to prevent further violations of its property rights. It does not seek damages or restitution for past wrongs, nor does it seek to rescind a past transfer of property.

Idaho state officials argue that the *Young* doctrine does not apply to this action, or to any action involving real property. More specifically, they contend that real property actions against state officials should be barred by the Eleventh

² Between the Ninth Circuit's issuance of its opinion and this Court's granting of *certiorari*, the United States filed suit against the State of Idaho on behalf of the Tribe, seeking to quiet title to approximately a third of the land covered by the Tribe's suit. *United States v. Idaho*, No. 94-0328 (D. Idaho)(complaint filed July 21, 1994).

Amendment because such suits actually seek to adjudicate the state's interest in or right to property and cannot resolve title disputes. They further contend that they are entitled to Eleventh Amendment immunity in this action because Idaho has a greater right to the disputed property than the Tribe and the Tribe can bring suit against Idaho to quiet title in state court.

Idaho state officials' arguments should be rejected. First, the *Young* doctrine has been used repeatedly to enforce real and personal property rights where, as here, the right to possess the property is founded in federal law or the deprivation of the property raises federal constitutional or statutory concerns. See, e.g., *Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch.) 11 (1815); *United States v. Lee*, 106 U.S. 196 (1882); *Poindexter v. Greenhow*, 114 U.S. 270 (1884); *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891); *Tindal v. Wesley*, 167 U.S. 137 (1897); *Goltra v. Weeks*, 271 U.S. 536 (1926); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670.

Creation of a real property exception to the *Young* doctrine would not only require the Court to overrule 200 years of jurisprudence, but would also seriously jeopardize the federal constitutional right to enjoy, own and dispose of property without undue governmental interference. Those deprived of such a right would not be able to bring suit in federal court to seek vindication.

Second, as this Court has repeatedly recognized, all actions using the *Young* doctrine are actions seeking to adjudicate a state's interests or rights. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Real property actions are no different.

Third, the fact that such suits cannot resolve title disputes is largely irrelevant. Here, as against the state offi-

cials, plaintiffs only seek cessation of those of Idaho's regulatory powers that are harmful to the Tribe. Should a court find in favor of plaintiffs and Idaho subsequently wishes to assert its ownership of the property, it may pursue its own remedies. *Lee*, 106 U.S. at 222; *Tindal*, 167 U.S. at 223.

Fourth, the fact that the state officials may ultimately prevail on the merits is also irrelevant. A determination of the merits in order to determine Eleventh Amendment immunity is patently improper. *Treasure Salvors, Inc.*, 458 U.S. at 699-700 (Stevens, J.); *id.* at 703 (White, J.).

Finally, the availability of a state forum does not deprive a federal court of jurisdiction. *Monroe v. Pape*, 365 U.S. 167 (1961); *Zwickler v. Koota*, 389 U.S. 241 (1967). To hold otherwise would mean that federal courts would no longer be the paramount protectors of federal rights. Each individual state legislature could prevent federal courts from adjudicating such rights by enacting some sort of remedial scheme.

Thus, because the Eleventh Amendment does not bar the Tribe's claims against the Idaho state officials, the decision of the Ninth Circuit must be affirmed.

ARGUMENT

I. THE COURT SHOULD NOT CREATE A REAL PROPERTY EXCEPTION TO *EX PARTE YOUNG*

In *Ex Parte Young*, 209 U.S. 123, this Court formally acknowledged the fiction that has permitted litigants to sue states in federal courts for violations of federally protected rights. While recognizing that suits against states seeking to enjoin state action violative of federally protected rights were barred by the Eleventh Amendment, the Court ruled that suits against the state officials responsible for the un-

lawful acts were not barred.³ The Court reasoned that, in their capacity as sovereigns, states were incapable of authorizing acts that infringe on rights secured by federal constitutional and statutory law, and thus unable to impart immunity to those they entrust with their implementation. *Id.* at 159.

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id. at 159-60.

Today, it is widely recognized that the doctrine annunciated in *Young* is "indispensable to the establishment of constitutional government and the rule of law." C. Wright, LAW OF FEDERAL COURTS 312 (5th ed. 1994). See also Erwin Chemerinsky, FEDERAL JUDICIARY 393 (2d ed. 1994). The *Young* doctrine establishes the power of federal courts to enforce federal law against state legislative and executive actions. It maintains the supremacy of the United States Constitution and federal statutory law in the face of

³ Although *Ex Parte Young* involved the deprivation of a constitutional right, there is no doubt that the doctrine established by that case applies also to federal statutory violations. See *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 297 (1937)("[g]enerally suits to restrain action of state officials can . . . be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States"); *Almond Hill School v. United States Dep't of Agriculture*, 768 F. 2d 1030, 1034 (9th Cir. 1985)("a state cannot authorize its officials to act in violation of federal statutory law").

state policy or action that threatens federal instrumentalities or federal programs or is in defiance of constitutional inhibitions. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. at 105 ("the *Young* doctrine rests on the need to promote the vindication of federal rights"); *Green v. Mansour*, 474 U.S. 64, 68 (1985)("[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law").

Idaho state officials and their *amici* urge the Court to adopt a real property exception to *Ex Parte Young*. They claim that, at least in the real property context, principles of federalism outweigh the rights of individuals to litigate federal constitutional or statutory deprivations in federal court. In essence, the state officials and their *amici* ask the Court to rule that some federal rights are more supreme, and consequently, more worthy of protection than others. Their arguments should be rejected. The Constitution does not prioritize protected rights; neither should the Court. The right to protect real property from unconstitutional takings or takings that violate federal statutory rights should not be relegated to second-class status.

A. The Court Has Repeatedly Sanctioned The Use Of The Officer Suit Doctrine In Actions Seeking Possession Of Real Property

Since its inception in jurisprudence, the officer suit doctrine has been used repeatedly to maintain the supremacy of real and personal property rights where the right to possess the property is grounded in federal law or the deprivation of the property raises federal constitutional or statutory concerns. Although *Young* was not decided until 1908, justification for the doctrine actually dates back nearly as far as the doctrine of sovereign immunity itself. As early as the

13th century, English common law courts distinguished between the King and his servants when applying the doctrine of sovereign immunity. See Louis L. Jaffe, "Suits Against Governments and Officers: Sovereign Immunity," 77 Harv. L.Rev. 1, 9 (1963). This Court acknowledged its existence in the first cases concerning the application of the doctrine of sovereign immunity to the conduct of state officials.

Although not a property case, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), is viewed as the Court's first acknowledgment of the doctrine. In *Osborn*, the Court upheld the issuance of an injunction preventing Ohio's tax collectors from levying a tax against the Bank of the United States pursuant to an unconstitutional state law. *Id.* at 860-71. In so doing, it rejected defendants' argument that, because they were state officials acting pursuant to state law, the case was barred by the Eleventh Amendment. Recognizing the need to maintain the supremacy of federal law, the Court stated that, "if the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof . . . [it can] furnish no authority to those who took, or to those who received, the money for which the suit was instituted." *Id.* at 859. Stripped of their state authority, the defendants were little more than bank robbers who had taken money "by violence." *Id.* at 741. See *United States v. Peters*, 9 U.S. (5 Cranch.) 115 (1809)(applying officer suit doctrine to a suit involving title to proceeds of the sale of a vessel condemned as a prize of war).

In the property context, the doctrine initially was used to permit adjudication of suits against military officials for possession (as opposed to title) of real property which federal or state governments had seized for military purposes. In each suit, the Court recognized that although the government was not named as a party defendant, the Court was being asked to adjudicate its right to possess the disputed property.

In *Meigs v. M'Clung's Lessee*, 13 U.S. 11, for example, the Court adjudicated a dispute between plaintiffs and military officials in which plaintiffs sought possession of land on which the United States government had erected a garrison at great expense. Although the officials asserted as a defense that they occupied the land at the behest of the United States government, the Court stated that the "the United States cannot have intended to deprive [the plaintiff] of [his land] by violence, and without compensation." *Id.* at 18.

In *United States v. Lee*, 106 U.S. 196, the Court held that it had jurisdiction to adjudicate a suit brought by General Robert E. Lee's son to oust federal officials from Arlington, property that had been seized by the United States government pursuant to an order of the Secretary of War. Although defendants ultimately conceded that the Secretary's order was unconstitutional, they claimed that they were entitled to sovereign immunity because they occupied the land at the request of the United States. *Id.* at 204. In rejecting this defense, the Court cited to those Amendments to the Constitution which stated "[t]hat no person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." It then reasoned that if it had the power to protect against the seizure of life and liberty by the government through the issuance of writs of habeas corpus to individual government officials, it must also have the right to protect against the seizure of property by the government without just compensation. *Id.* at 218.

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity It is the only supreme power in our system of government, and every man who, by accepting an office, participates in its functions, is only the

more strongly bound to submit to that supremacy, and to observe the limitations it imposes

....

Id. at 220.⁴

The Court soon moved away from the military context. In *White v. Greenhow*, 114 U.S. 307 (1885), it held that an action against the treasurer of the City of Richmond, Virginia, for the recovery of personal property seized for delinquent taxes, was not barred by the Eleventh Amendment. Because the state statute pursuant to which the treasurer had taken the property was unconstitutional, the action could not be characterized as one against the state for purposes of sovereign immunity. *Id.* at 316-17, citing *Poindexter v. Greenhow*, 114 U.S. 270.

Relying on *Osborn*, the Court in *Pennoy v. McConaughy*, 140 U.S. 1, ruled that it could enjoin Oregon state officials from selling land to which the plaintiff claimed title pursuant to a contract with the state. The Court ultimately concluded that the state legislation authorizing the state officials to sell the property was unconstitutional in that it impaired the state's contractual obligations. Because the state could not authorize its officials to commit unconstitutional acts, it could not immunize them from liability for the com-

⁴ In their *amicus* brief, the Council of State Governments, *et al.*, wrongly assert that *Lee* and other cases cited herein are really due process cases and hold that the officer suit fiction is unavailable if plaintiffs may seek relief in another forum, such as a state court. Brief of the Council of State Governments, *et al.* ("Council's Brief") at 15-18. Such an argument ignores the plain language of these decisions. In none of these cases does the Court rule that the existence of a state remedy deprives a federal court of jurisdiction. Instead, it repeatedly asserts that the officer suit fiction is available to maintain the supremacy of federal law in the face of state action that violates federally protected rights. See, e.g., *Lee*, 106 U.S. at 218-20.

mission of such acts. *Id.* at 10.

In *Tindal v. Wesley*, 167 U.S. 204, the Court rejected defendants' sovereign immunity defense in an action seeking to recover possession of real property which the State of South Carolina allegedly had seized without affording plaintiffs due process or providing them with just compensation. Defendants argued that, because they had taken possession of the property on behalf of the state, a suit against them was a suit against the state and barred by the Eleventh Amendment. Relying on *Lee*, the Court stated that "[the] Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law." 167 U.S. at 222. See *Scott v. Donald*, 165 U.S. 58 (1897) (Eleventh Amendment did not bar action to restrain state officials from seizing wines and liquors pursuant to state liquor dispensary law where it was alleged that state law was unconstitutional).

In 1908, citing *Osborn*, *Lee*, *Pennoy*, and *Tindal*, the Court issued its decision in *Ex Parte Young*, itself a property case. In *Young*, shareholders of the Northern Pacific Railway Company sought an injunction preventing Minnesota's attorney general from enforcing legislation setting rates for the transportation of passengers and commodities within Minnesota. Plaintiffs contended that the rates were so low that they were confiscatory and amounted to a deprivation of property without due process. 209 U.S. at 127-132. The defendant claimed that he was entitled to Eleventh Amendment immunity because plaintiffs' action was really against the state. In rejecting this defense, the Court stated:

The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does

not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

Id. at 159. See also *Public Service Co. v. Corboy*, 250 U.S. 153 (1919)(state drainage commissioner not entitled to sovereign immunity in an action to enjoin him from diverting water from a river where state law authorizing diversion was allegedly unconstitutional); *Goltra v. Weeks*, 271 U.S. 536 (using the officer suit doctrine to permit adjudication of a case alleging that a United States officer had seized a fleet of towboats and barges leased to plaintiff in violation of plaintiff's due process rights); *Ickes v. Fox*, 300 U.S. 82 (1937)(using officer suit doctrine in an action to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which would have deprived plaintiffs of property rights acquired under Congressional acts, state laws and government contracts).

Because the officer suit doctrine had also been used to remedy common law torts arising under state law,⁵ the Court in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), clarified that the rule of law set forth in *Lee* and *Tindal* only applied to those real property disputes raising federal constitutional or statutory concerns. More specifically, the Court found that while a state could not authorize state officials to violate federal law, it could

⁵ See, e.g., *Brown v. Huger*, 62 U.S. (21 How.) 305 (1859)(action against military officer to recover possession of the military arsenal at Harper's Ferry, a suit which plaintiff ultimately lost on the merits); *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363 (1868)(suit against a military officer for possession of land set aside for military purposes, another suit which plaintiff ultimately lost on the merits).

authorize them to commit a common law tort. Thus, state officials who committed common law torts were entitled to sovereign immunity, unless that tort also amounted to a violation of a federal constitutional or statutory right.⁶ *Id.* at 693, 695. See *Malone v. Bowdoin*, 369 U.S. 643 (1962) (holding that federal court did not have jurisdiction to adjudicate land dispute with federal government because plaintiffs did not allege a violation of federal constitutional or statutory rights).

In 1972, Congress passed the Quiet Title Act, 28 U.S.C. §§1346(f), 1402(d) and 2409(a), in which the United States waived sovereign immunity with respect to real property disputes. Consequently, the officer suit doctrine was no longer necessary to resolve such controversies with the federal government. See *Block v. North Dakota*, 461 U.S. 273 (1983). In 1982, however, the Court affirmed its holdings in *Lee* and *Tindal* as they applied to property disputes involving state governments. In *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, it held that the Eleventh Amendment did not bar the issuance of an arrest warrant requiring state officials to turn over property obtained from a sunken ship. The state could not authorize the officers to retain possession of the property without raising "a

⁶ In *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667, 672 (5th Cir.), cert. denied, 115 S.Ct. 577 (1994), the Fifth Circuit erroneously states that *Larson* overruled *Tindal*. As the Ninth Circuit noted in this case,

Pennhurst concludes that to the extent that *Tindal* was a tort case, it was overruled by *Larson*. However, to the extent that *Tindal* alleged a violation of a federal right, it clearly remains valid. See *Treasure Salvors*, 458 U.S. at 685-89 (Stevens, J., plurality opinion), 706, 102 S.Ct. at 3314-17, 3325 (White, J., concurring and dissenting).

Coeur d'Alene Tribe of Idaho v. Idaho, 42 F.3d at 1252 n.7.

substantial constitutional question." *Id.* at 697.

Thus, the basic principle that in appropriate circumstances federal courts will exercise their equity power against state officials to protect property rights secured and activities authorized by paramount federal law is firmly embedded in our jurisprudence.

B. The Arguments Of The Idaho State Officials And Their *Amici* On Behalf Of A Real Property Exception To *Ex Parte Young* Are Without Merit

Idaho state officials and their *amici* would have this Court overrule almost 200 years of jurisprudence to adopt a real property exception to the *Young* doctrine. They claim that such an exception should be made because suits against state officers for possession of disputed property are really suits against the state. Brief for the Petitioner ("Pet. Brief") at 12-26; Council's Brief at 11-14. They further argue that because it is the state who ultimately claims title to the land, such suits could never ultimately resolve the dispute before the court, *i.e.*, which of the litigants has better title. Brief of the *Amici* States of California, *et al.* ("States' Brief") at 15; Council's Brief at 19-26. Each contention is without merit.

With respect to the first, real property disputes are no different than any other suit in which the *Young* doctrine is employed. All such suits seek to adjudicate a state's interests or rights. Although they may not seek to adjudicate a state's right to possess real property, they could seek to adjudicate a state's right to personal property, *see, e.g.*, *Spruytte v. Walters*, 753 F.2d 498 (6th Cir. 1985)(applying *Young* doctrine to prisoner's claim to a paperback dictionary); *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir.), *cert. denied*, 469 U.S. 1127 (1985)(applying *Young* doctrine to

suit against state officer who had allegedly conspired to revoke plaintiff's medical license); or they could contest the state's right to promulgate certain laws, *see, e.g.*, *American Bank & Trust Co. of Opelousas v. Dent*, 982 F.2d 917 (5th Cir. 1993)(using officer suit doctrine in action seeking declaration that a state statute prohibiting the sale of insurance was unconstitutional); practices, *see, e.g.*, *Armstead v. Coler*, 914 F.2d 1464 (11th Cir. 1990)(applying *Young* doctrine to case in which mentally retarded patients challenged state's failure to provide them with appropriate services); or procedures. *See, e.g.*, *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984)(using *Young* doctrine in suit challenging state system of disbursing benefits to those who had descended from aboriginal inhabitants).

This Court has long recognized that "an official-capacity suit is, in all respects other than name . . . a suit against the [government] entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). As the Court stated in *Pennhurst, Ex Parte Young* is "an important exception to [the] general rule" that a suit against state officials that is in fact a suit against a State is barred. *Pennhurst*, 465 U.S. at 101-02. *See Treasure Salvors, Inc.*, 458 U.S. at 685 (Stevens, J.) ("[t]here is a well-recognized irony in *Ex Parte Young*; unconstitutional conduct by a state officer may be 'state action' for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh").

With respect to the second contention, the fact that adjudication of a property dispute against state officials will not quiet title to the land in question is largely irrelevant. For the last 100 years, this Court has held that the fact that a federal court may not have the power to adjudicate the state's title to property does not prevent it from adjudicating who has right to physical possession of that property. *Lee*, 106 U.S. at 222; *Tindal*, 167 U.S. at 223-24; *Treasure Salvors, Inc.*, 458 U.S. at 697 (Stevens, J.).

Moreover, as this Court noted in *Tindal*, a state does not have to stand by while the federal action moves forward. Like any other litigant who feels that its rights are being threatened, a state may always intervene. Should it choose not to, it may "bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute." 167 U.S. at 223. See *Lee*, 106 U.S. at 222 (noting that "the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial" to quiet its title to the land in question).

The argument of the state officials, however, should be rejected for a third, more important reason. To preclude federal courts from adjudicating real property disputes that raise federal law concerns will seriously jeopardize the federal constitutional right to enjoy, own and dispose of property without undue governmental interference. It could very well result in the subjugation of federal law to unconstitutional state policies, practices and laws. As the plurality noted in *Treasure Salvors, Inc.*:

If a statute of the State of Florida were to authorize state officials to hold [property] in circumstances such as those presented in this case, a substantial constitutional question would be presented. In essence, the State would have authorized state officials to retain property regardless of the manner in which it was acquired, with no duty to provide compensation for a public taking. If the Constitution provided no protection against such unbridled authority, all property rights would exist only at the whim of the sovereign.

458 U.S. at 697 (Stevens, J.). See *Osborn*, 22 U.S. at 847 (to deny jurisdiction in cases raising questions of federal law would result in the untenable assertion that "the agents of a

State, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States").

It will also result in the prioritization of federal constitutional and statutory rights. A real property exception to the *Young* doctrine essentially proclaims that while all rights might be supreme, some are more supreme, and worthy of protection, than others. Federal courts will be able to protect against the deprivation of life and liberty without due process, but unable to prevent the deprivation of property without due process or just compensation.

This Court previously has refused to create such a hierarchy of rights. See, e.g., *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972)(citing interdependence between right to liberty and right to property), *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309, 2320 (1994)(acknowledging that the Takings Clause of the Fifth Amendment is as much a part of the Bill of Rights as the First and Fourteenth Amendments). It should not do so now.

II. THE NINTH CIRCUIT PROPERLY HELD THAT THE ELEVENTH AMENDMENT DOES NOT PRECLUDE A FEDERAL COURT FROM ADJUDICATING THE TRIBE'S CLAIM AGAINST THE IDAHO STATE OFFICIALS

The Tribe's claims against Idaho state officials fall squarely within the exception to the Eleventh Amendment created by *Lee*, *Tindal*, *Ex Parte Young* and *Treasure Salvors, Inc.* The Eleventh Amendment does not bar a federal court from adjudicating a claim for prospective injunctive relief against state officials who are allegedly acting contrary to federal law.

Here, the Tribe seeks an injunction enjoining the Idaho

state officials from violating rights allegedly secured to it by an executive order ratified as a federal statute. *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d at 1247. See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974)(Indian property rights are federal rights). The fact that the state officials, in administering and maintaining the disputed land, may be acting in a manner consistent with a state statute does not deprive a federal court of jurisdiction. See States' Brief at 8-9. As the Ninth Circuit stated:

Because federal law preempts state law, if the property at issue in this case belongs to the Tribe pursuant to federal law, the Officials must conform their actions to that federal law in spite of state statutes that purport to regulate the property as belonging to the states.

42 F.3d at 1251.⁷

The relief sought by the Tribe against the state officials is prospective injunctive relief, consistent with the principles annunciated by this Court in *Edelman v. Jordan*, 415 U.S. 651. In *Edelman*, the Court ruled that the *Young* doctrine only applied to official capacity suits seeking prospective, as opposed to retrospective, relief. Subsequent Supreme Court decisions explained that the *Young* doctrine was not designed to compensate victims for loss, but to prevent future unlawful acts. See *Pennhurst*, 465 U.S. at 105-06; *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974). They also explained that the fact that an injunction requiring state officials to conform their future conduct to the requirements of federal law may have an ancillary effect on the state treasury does

⁷ Defendants wrongfully analogize this case to one in which state officers are acting pursuant to "admittedly constitutional" state statutes. Pet. Brief at 32. The Tribe has never conceded the lawfulness of the state statutes at issue.

not make it impermissible. *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

Here, the Tribe seeks an injunction prohibiting Idaho state officials from taking any action in the future that violates its rights to the use and occupancy of the land in question. Complaint at 9. As the Ninth Circuit noted, the Tribe "is not seeking damages or restitution for past wrongs nor is it seeking to rescind a past transfer of property." 42 F.3d at 1254-55. See *Treasure Salvors, Inc.*, 458 U.S. at 698-9 (Stevens, J.)(plaintiff's request for possession of disputed property was permissible relief because it did not seek "an attachment of state funds and would impose no burden on the state treasury [it] is not asserting a claim for damages against either the State . . . or its officials").

That the Tribe's claims are based, in part, on an Executive Order issued in 1873 does not make the relief it seeks retrospective. The continuing act of holding the Tribe's property can be characterized as an ongoing violation of federal law. See John F. Duffy, "Sovereign Immunity, the Officer Suit Fiction, and Entitlement Benefits," 56 U.Chi.L. Rev. 205, 303 n.45 (1989). Pursuant to this Court's decision in *Quern*, the fact that requiring state officials to cede possession of the property to the Tribe may have an effect on Idaho's treasury is immaterial. See *Milliken v. Bradley*, 433 U.S. 267 (1977).

Despite the above, Idaho state officials and their *amici* argue that the Tribe's claims are barred by the Eleventh Amendment because Idaho has a stronger legal entitlement to the property than does the Tribe. Pet. Brief at 18-26; States' Brief at 15-16.⁸ As this Court has held, a determi-

⁸ In fact, the state *amici* go as far as to assert that the *Ex Parte Young* fiction should not apply to claims that are "frivolous or insubstantial."

(continued...)

nation of the merits in order to determine Eleventh Amendment immunity is patently improper. *Treasure Salvors, Inc.*, 458 U.S. at 700 (Stevens, J.)("[i]n making the determination [that the Eleventh Amendment did not bar the execution of the arrest warrant], the court of appeals improperly adjudicated the State's right to the artifacts"). See *id.* at 703 (White, J.)(merging a determination on the merits of the validity of State's claim with resolution of the jurisdiction issue "is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses"), citing *Florida Dep't. of State v. Treasure Salvors, Inc.*, 621 F.2d at 1352 (Rubin, J, dissenting). "The possibility that a defendant will ultimately prevail on the merits does not clothe that defendant in Eleventh Amendment immunity." *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d at 1251. See *Scheuer*, 416 U.S. at 238.⁹

Idaho state officials also argue that they are entitled to Eleventh Amendment immunity because the Tribe already has an adequate remedy under state law. They claim that the Tribe may bring a quiet title action against Idaho in state court pursuant to a quiet title law enacted by Idaho's legisla-

⁸ (...continued)

States' Brief at 15. There are a variety of devices to combat frivolous or unsubstantial allegations short of an Eleventh Amendment jurisdictional bar. These devices include motions to dismiss for failure to state a claim, Fed.R.Civ.P. 12(b)(6), and motions for sanctions pursuant to Fed.R.Civ.P. 11.

⁹ The *Treasure Salvors, Inc.* decision has been interpreted as holding that the existence of the Eleventh Amendment immunity depends on which party to the litigation has a "colorable" claim to the disputed property. If the state has a colorable claim, then it is entitled to sovereign immunity. See Pet. Brief at 19-20, 23-26. *Amici* respectfully suggest that this interpretation of the *Treasure Salvors, Inc.* decision is incorrect. A decision as to which party's claim is more "colorable" necessarily involves a determination of the merits.

ture. Pet. Brief at 26 n.6; States' Brief at 12-13; Council's Brief at 15-19.

This argument must be rejected for a number of reasons. First, this is not a procedural due process case. Thus, the fact that the State may provide the Tribe with a procedural due process remedy is irrelevant. Cf. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Zinerman v. Burch*, 494 U.S. 113 (1990).

Second, the availability of a state forum does not deprive a federal court of jurisdiction. As the Court noted in *Monroe v. Pape*:

It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

365 U.S. 167, 183 (1961). See *Zwickler v. Koota*, 389 U.S. at 248, quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884) ("escape from [adjudication of a constitutional claim] is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts ' . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States'").

Should the Court adopt the arguments of the defendant state officials and hold otherwise, federal courts would no longer be the paramount protectors of federal constitutional rights. Each state legislature could prevent those federal courts within its jurisdiction from adjudicating federally protected rights by enacting some sort of state remedial scheme. As this Court has repeatedly recognized, however, Congress intended, with the passage of the 1871 Civil Rights Act, to "interpose the federal courts between the States and the people, as guardian of the people's federal rights." *Patsy v. Florida Board of Regents*, 457 U.S. 496, 503 (1982), quot-

ing *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). See *Stefel v. Thompson*, 415 U.S. 452, 472-73 (1974).¹⁰

Lastly, under the guise of an immunity argument, the *amici* of the Idaho state officials claim that general equitable principles require a court to abstain from adjudicating this action.¹¹ Citing *Younger v. Harris*, 401 U.S. 37 (1971), they argue that a federal court should refuse to exercise jurisdiction over the Tribe's claims because "the relief sanctioned by the court of appeals" could result in the ejection of the public from the disputed land, Council's Brief at 12-15, 19-20, "anarchy," *id.* at 24, and "confrontation which breaches the peace." *Id.* at 25. See States' Brief at 9-10.

First, *Younger* does not apply in this case. In *Younger*, the Court held that federal courts must abstain from adjudi-

¹⁰ The fact that the United States may bring suit on behalf of the Tribe as its trustee also does not deprive a federal court of jurisdiction. As this Court has noted, there may be circumstances where the United States is either unable or unwilling to bring such a suit because of a conflict of interest or a lack of resources or political will. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 560 n.10 (1983); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 784-5 (1991) (Blackmun, J., dissenting); see also 28 U.S.C. §1362. In this case, for example, although the United States has filed an action on behalf of the Tribe, it only seeks to quiet title to approximately a third of the land covered by this suit. See *United States v. Idaho*, No. 94-0328 (D. Idaho) (complaint filed July 21, 1994).

¹¹ Defendants also argue that this case is analogous to *Oregon v. Hitchcock*, 202 U.S. 60 (1906), and *Louisiana v. Garfield*, 211 U.S. 70 (1908), real property disputes against the United States government involving questions of federal statutory interpretation in which the Court refused to employ the officer suit fiction. Pet. Brief at 32-34. Defendants are wrong. The Court refused to adjudicate these suits because they essentially sought to review discretionary acts by the executive, a co-equal branch of government and, therefore, presented what today would be called "political questions." See *Baker v. Carr*, 369 U.S. 186, 208-29 (1962).

cating actions that will impermissibly interfere with ongoing state court proceedings. 401 U.S. at 41. Here, there is no ongoing state court proceeding with which this action could interfere.

Second, the argument of *amici* presupposes that the Tribe will prevail and that it will take certain actions after it has won the right to control the disputed property. Nothing in the history of the *Young* doctrine suggests that state officers are entitled to sovereign immunity because plaintiffs might win.

Finally, in *Lee*, a case also involving access to land held by the government for the benefit of the public, this Court rejected a similar argument, stating:

The fact that the property, which is the subject of this controversy, is devoted to public uses, is strongly urged as a reason why those who are so using it under the authority of the United States shall not be sued for its possession, even by one who proves a clear title to that possession. In this connection many cases of imaginary evils have been suggested, if the contrary doctrine should prevail. Among these are a supposed seizure of vessels of war, invasions of forts Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depends the rights of the individual or of the Government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.

106 U.S. at 217.

Thus, the Eleventh Amendment does not bar the Tribe's claims against the defendant state officials for injunctive and declaratory relief.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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